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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

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No. 278

JAMES P. MITCHELL, SECRETARY OF LABOR,  
UNITED STATES DEPARTMENT OF LABOR,  
PETITIONER,

VS.

KING EDWARD TOBACCO COMPANY OF FLORIDA  
AND MAY TOBACCO COMPANY

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 29, 1955

CERTIORARI GRANTED OCTOBER 17, 1955

# SUPREME COURT OF THE UNITED STATES

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(CLERK'S NOTE: The petition for writ of certiorari in this case seeks a review of separate judgments of U.S.C.A., 5th, entered on separate records in each of two cases, pleadings in which are materially different. For that reason, separate records have been printed.)

In the United States District Court for the Northern District of Florida, Tallahassee Division.

Civil Action No. 340

MERRICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, *Plaintiff*,

*versus*

KING EDWARD TOBACCO COMPANY OF FLORIDA, A FLORIDA CORPORATION, *Defendant*

COMPLAINT--Filed March 28, 1952

I

Plaintiff brings this action to enjoin defendant from violating the provisions of Sections 15(a)(1), 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended by 63 Stat. 910; U.S.C. Ti. 29, Sec. 201, et seq.) hereinafter called the Act.

II

Jurisdiction of this action is conferred upon the Court by Section 17 of the Act.

III

Defendant, at all times hereinafter mentioned, was, and is, a corporation organized and existing under and by virtue of the laws of the state of Florida by virtue of which it is licensed to do business and is doing business at 123 W. Washington Street, Quincy, Florida, within the jurisdiction of this Court, where it is engaged in the production, sale and distribution of tobacco.

IV

At all times hereinafter mentioned defendant employed, and is employing, approximately one hundred and twenty (120) employees in and about its said place of business and packing house (known as Packing House No. 1) in Quincy, Florida, in the production of tobacco for interstate commerce, within the meaning of the Act.

Substantial quantities of the goods produced by these employees have been, and are being, produced for interstate commerce and have been, and are being, shipped, delivered, transported, offered for transportation and sold in interstate commerce and shipped, delivered or sold with knowledge that shipment, delivery or sale thereof in interstate commerce is intended from defendant's place of business to other states.

## V

Defendant repeatedly has violated and is violating the provisions of Sections 5 and 15(a)(2) of the Act by paying to many of its employees for their employment in the production of goods for interstate commerce, as aforesaid, wages at rates less than seventy-five cents an hour during the period since January 25, 1950.

## VI

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11(c) of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of the wages, hours and other conditions and practice of employment to be made, kept and preserved by every employer subject to any provision of the Act. The said regulations and amendments thereto were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

## VII

Defendant, an employer subject to the provisions of the Act, repeatedly has violated, and is violating, the provisions of Sections 11(c) and 15(a)(5) of the Act in that since on or about January 25, 1950, it has failed to make, keep and preserve adequate records of its employees and the hours and other conditions and practices of employment maintained by it, as required by the said regulations, in that the records kept by the defendant failed to show, among other things, the hours worked each workday and each workweek.

## VIII

Defendant repeatedly has violated, and is violating, the provisions of Section 15(a)(1) of the Act in that, since January 25, 1950, it has shipped, delivered, transported, offered for transportation and sold in interstate commerce and has shipped, delivered or sold with knowledge that shipment, delivery or sale thereof in interstate commerce was intended from its said place of business at Quincy, Florida, to other states, goods in the production of which many of its employees were employed in violation of Section 6 of the Act as alleged.



IX

Defendant has repeatedly violated the afore-said provisions of the Act. A judgment enjoining and restraining the violations hereinabove allegedly is specifically authorized by Section 17 of the Act.

5. Wherefore, cause having been shown, plaintiff prays judgment permanently enjoining and restraining defendant, its officers, agents, servants, employees, attorneys and all persons acting or claiming to act, on its behalf or in its interest, from violating the provisions of Section 15(a)(2) and 15(a)(5) of the Act, and such other and further relief as may be necessary and appropriate.

WILLIAM S. TYSON,

*Solicitor,*

BEVERLEY R. WORRELL,

*Regional Attorney,*

ROBERTSON C. BESSE,

*Attorney, United States Department of Labor,*

*Attorneys for Plaintiff.*

Post Office Address:

Office of Solicitor,

U. S. Department of Labor,

1908 Comer Building,

Birmingham 3, Alabama.

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- In United States District Court

ANSWER - Filed May 6, 1952

Comes now the defendant King Edward Tobacco Company of Florida, a Florida corporation, by its undersigned attorneys, and for answer to the complaint says:

Defendant admits the allegations of paragraph 1 of the complaint, except that the defendant denies and says it is not true that the defendant has violated or is violating the provisions of said Fair Labor Standards Act.

II

Defendant admits that this Court has jurisdiction to restrain violations of Section 15 of said Fair Labor Standards Act, but defendant denies and says it is not true that defendant has violated or is violating any of the designated provisions of Section 15 or any other provision of said Act.

### III

Defendant admits the allegations of paragraph III of the complaint.

### IV

(a) Defendant admits the allegations of paragraph IV of the complaint, but the defendant further alleges that the defendant is a farmer, and that at all times mentioned in said complaint the defendant was continuously and actively engaged in farming operations and was actively planting, cultivating, growing and harvesting tobacco on farms of the defendant in Gadsden County, Florida, all located within less than 25 miles of defendant's said packing house No. 1, that at all times mentioned in said complaint the acreage of defendant's said farms actually and actively devoted to the growing of such tobacco (known as "shade" acreage) was not less than 220 acres, and that defendant's said packing house No. 1, as alleged in said complaint, is and was located in said City of Quincy at 123 West Washington Street; that all tobacco stored, packed or in any manner handled at defendant's said packing house No. 1 is and was at all times mentioned in said complaint none other than tobacco which was and is planted, cultivated, grown and harvested on defendant's aforesaid farms, and not on or from any other farm or farms; and defendant further alleges that the employees of the defendant referred to in said paragraph IV of the complaint were engaged in work and practices all performed for and by the defendant as an incident to and in conjunction with defendant's said farming operations, including the preparation of said defendant's tobacco crops for market.

(b) Further answering said paragraph IV, the defendant alleges, alternatively, that defendant's employees referred to in said paragraph IV were at all times mentioned in said complaint all employed in an agricultural community and engaged in the handling, packing, storing, drying and preparing for market of cigar leaf tobacco in its raw or natural state, and that all such tobacco is and was at all times mentioned in the complaint planted, cultivated, grown and harvested on and from farms located in Gadsden County, Florida, and within a distance of 25 miles from defendant's said packing house No. 1.

Defendant denies the allegations of paragraph V of said complaint, and alleges that for the reasons and because of the facts hereinabove set forth the employees of the defendant mentioned in said complaint are and are exempt from the provisions of said Act and that the defendant has not violated and is not violating the provisions of said Act.

## VI

Defendant admits the allegations of paragraph VI of said complaint; but alleges that said regulations, or said Act, for the reasons and because of the facts hereinabove set forth are and were not applicable to the employees of said defendant mentioned and described in said complaint to the activities of the defendant described in said complaint.

## VII

Answering paragraph VII of said complaint, the defendant denies that the defendant is subject to the provisions of said Act, and alleges that defendant has not violated and is not violating the provisions of said Act.

9

## VIII

Defendant admits the allegations of paragraph VIII of said complaint, except that this defendant denies and says it is not true that this defendant has violated or is violating the provisions of said Act and defendant alleges that the employees of defendant mentioned in said complaint were not and have not been and are not being employed in violation of Section 6 of said Act or of any other provision of said Act.

## IX

Answering paragraph IX of said complaint, defendant denies that the defendant has violated or is violating the provisions of said Act, and defendant further alleges that a judgment enjoining and restraining the acts of said defendant set forth in said complaint is not authorized by Section 17 of said Act or by any other provision of said Act.

Wherefore, the defendant prays judgment that said complaint be dismissed.

EDW. MCCARTHY,

RICHARD J. GARDNER,

*Attorneys for Defendant.*

Of Counsel:

MCCARTHY, LANE & ADAMS,  
423 Atlantic Bank Building,  
Jacksonville, Florida.

GARDNER AND JONES,  
Orlando, Florida.

(Certificate of Service Omitted.)

## 10 IN UNITED STATES DISTRICT COURT

MOTION FOR SUMMARY JUDGMENT—Filed August 7, 1952

Comes now the defendant, by its undersigned counsel, and moves the Court for summary judgment on the pleadings and the affidavits hereto attached of J. D. Vrieze and Waldo S. Carroll and upon such affidavits as the plaintiff may offer at the hearing of this motion; and for grounds of this motion, defendant would show to the Court that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law.

EDW. MCCARTHY,  
RICHARD J. GARDNER,  
*Attorneys for Defendant.*

Of Counsel:  
MCCARTHY, LANE & ADAMS,  
GARDNER AND LINES.

## 11 AFFIDAVIT OF J. D. VRIEZE

STATE OF FLORIDA,  
County of Gadsden:

J. D. VRIEZE, being first duly sworn, deposes and says:

I am a resident of the town of Quincy, Gadsden County, Florida, and am employed by King Edward Tobacco Company, a Florida corporation, in the capacity of General Manager.

I have been engaged in the business of planting, raising, curing, buying, selling, warehousing and packing cigar leaf tobacco for a period of 32 years.

The King Edward Tobacco Company of Florida, of which I am General Manager, is engaged in the business of planting, raising, harvesting, curing, warehousing and packing of cigar wrapper leaf tobacco in Gadsden County, Florida. Said corporation is now and has been at all times mentioned in the complaint and answer filed in this cause operating shade tobacco farms in Gadsden County, Florida, having a total acreage of 4460 acres, including uncultivated land, woodland and pasture, as well as 206.5 acres of land upon which cigar wrapper tobacco, known as U. S. Type No. 62, was grown during 1952.

U. S. Type No. 62 tobacco is used exclusively for cigar wrappers. It is grown only in Gadsden, Leon and Madison Counties, Florida, and in DeKalb and Grady Counties, Georgia, and nowhere else in the world, unless in quantities that are inconsequential. The crop is grown in fields which are completely covered and enclosed with



a cheesecloth shade. The cost per acre of production and the price per acre which the farmer receives for his crop are, to my knowledge, the highest of all agricultural crops produced in the United States, with the exception of other types of wrapper tobacco grown in other sections of the county.

King Edward Tobacco Company owns and operates a warehouse in the town of Quincy, known as Warehouse No. 1, to which is brought and in which is bulked and packed shade-grown cigar wrapper leaf tobacco (Type No. 62) produced exclusively on said company's farms in Gadsden County, Florida, all within a radius of 13 miles of said Warehouse No. 1 in Quincy.

Within the corporate limits of the town of Quincy there are also 12 other cigar leaf tobacco warehouses, to which warehouses are brought, bulked and packed shade-grown cigar wrapper leaf tobacco produced in Gadsden County, Florida, also Leon County, Florida, and Decatur and Grady Counties, Georgia.

All the shade-grown tobacco (Type 62) grown in Leon and Gadsden Counties, Florida, and in Decatur and Grady Counties, Georgia, is produced within a radius of 30 miles from the town of Quincy. The average annual production of shade-grown Type 62 in this area is approximately five million pounds. Of this average annual production an average of approximately three million pounds is brought to and warehoused in the town of Quincy.

The annual production of all agricultural products in Gadsden County, Florida, amounts to approximately \$12,000,000.00, including all crops, cattle and other farm products; and the average annual production of shade-grown cigar wrapper leaf tobacco in Gadsden County, Florida, is approximately \$9,000,000.00, 76% of which is brought to, bulked and packed in warehouses located in the town of Quincy. Gadsden County, Florida, is an agricultural County and the town of Quincy is a predominantly agricultural community, the majority of whose inhabitants gain their livelihood from and depend upon agriculture.

In harvesting this type of tobacco, as each leaf reaches a certain state of maturity on the stalk, it is picked or "primed", the lower leaves being first picked,—perhaps two or three from each stalk, and this "priming" is repeated from 4 to 7 times on up the stalk as the tobacco leaves mature. The leaves so picked are called "first primings" or "sand leaves", "second primings", "third primings", and so on. At each priming the leaves are immediately taken into the selling barn, strung and hung on stocks to dry. Although leaves of several different primings are hung in the same barn at the same time, as each priming completely loses its green color and becomes a shade of brown, it is taken down, packed loosely in boxes and carried to the warehouse where it is placed in bunks.

each bulk containing between 3500 and 4500 pounds of tobacco. The transference from the curing barns to the bulks must be prompt, in order to avoid any harmful stoppage or acceleration of the intra-cellular changes that are continuously taking place within the leaf.

The entire process of the treatment or care of the leaf, from the time it is first hung in the tobacco barn after priming until the time that the bulk sweating is completed, is one entire and continuous process of natural transformation within the leaf itself necessary to make the leaf in its raw and natural state fit for the only use for which it is produced. Such care of wrapper tobacco, as distinguished from filler and binder types, is as necessary, or more necessary, for the purpose of assuring the desired color and general appearance than for the purpose of affecting its flavor or aroma. This continuous natural internal transformation is completed without the addition, application or use of any external catalyst or other chemical or artificial stimulation or processing, other than to control and regulate temperature. Atmospheric temperature is controlled in the curing barn, and the temperature of the bulks is controlled in the warehouse by taking down and rebuilding the bulks from time to time. Such temperature control is necessary to prevent either an injurious acceleration or an injurious stoppage of the natural internal transformation of the leaf, which is nothing more than a gradual and continuous process of drying and oxidation, accompanied by intra-cellular activities of micro-organisms and of the internal organic chemicals within the leaf.

The changes in the tobacco leaf which occur after the leaf is taken from the barn and put into the warehouse are such as could be allowed to continue, and would continue, if the leaf were left in the curing barn, if the barn had proper temperature and atmospheric control. But this would be impracticable, first, because there are not enough curing barns on the farm to accommodate or store all the tobacco that would have to be accumulated during the entire period of time from the first harvesting or priming until the time that the bulk sweating is completed and the tobacco is ready for grading and packing, and, second, because the natural processes which continue through the period of bulk sweating would be too slow and would take too long if the tobacco leaf were left hanging in the curing barn.

When the green leaf is primed and first hung in the curing barn its water content is 80% to 85%, and the initial stages of curing the leaf in the barn consist primarily of a natural and gradual drying of the leaf and the evaporation of the large excess of water, which must be at such a rate and under such conditions as will not injuriously interfere with the accompanying intra-cellular chemis-

cell transformations that take place contemporaneously and continuously throughout the entire curing and bulk sweating process. The most obvious change which occurs in the leaf while undergoing barn curing is (1) the loss of water, which is reduced from 89% to 85% content to a moisture content of between 10% and 25, and (2) the loss of its green color and a coloring of the leaf; but irrespective of the moment when the leaf is removed from the curing barn into the warehouse it is impossible to say that at what moment of time, or that at any particular moment of time, those intra-cellular changes which are predominant during the barn-curing period cease and those intra-cellular changes which are predominant during the period of bulk sweating begin. In other words, the intra-cellular transformation which is predominant during the period of barn curing continues to take place after the leaf is moved into the warehouse and the bulk sweating is begun. Likewise, those intra-cellular transformations which are predominant during the period of bulk sweating actually have their inception while the leaf is still hanging in the curing barn.

Thus, for instance, the loss of moisture which is more rapid during the period of barn-curing continues throughout the period of bulk sweating in the warehouse, although at a slower rate. And the coloring of the leaf which commences in the curing barn also continues during the period of bulk sweating, the leaf becoming a deeper green, red or brown. The most notable chemical changes in the constituency of the leaf are a decrease in malic acid and nicotine content, which is continuous throughout the period of barn-curing and the period of bulk sweating; also a rise in the citric acid content during the period of barn-curing followed by a reduction of the citric acid content during the period of bulk sweating. The latter change, first in the accumulation and then in the loss of citric acid, is not a sudden change, but gradual, and is believed to be due, not to the fact that the leaf is taken out of the curing barn and put into bulks in the warehouse, but to the effect of other accompanying internal chemical changes and activities of intra-cellular micro-organisms.

During the period of bulk sweating the leaf undergoes a most noticeable fermentation caused by the activities of intra-cellular micro-organisms. Although most pronounced during the period of bulk sweating, fermentation actually begins during the time that the leaf is still hanging in the curing barn. The process of bulk sweating is not for the purpose of causing such fermentation, but for the purpose of controlling and regulating it so as not to injure the leaf or destroy its flavor, aroma, burning qualities or its important color and general appearance.

After the bulking process in the warehouse is completed, and before the leaf is graded and packed, the leaf is re-moistened,

being sprayed with a fine spray. This remoistening, or "Kasing" as it is called, is not for the purpose of stimulating or affecting the process of fermentation, but to keep the leaf soft and pliable enough to withstand necessary handling without breakage or injury. Without such remoistening the leaf would become so dry and brittle that it could not be handled without breakage or injury.

(S.) J. D. VRIEZE

Sworn to and subscribed before me this 4 day of August, 1952

(S.) WILLIAM D. LINES

Notary Public

(NP Seal)

My commission expires: April 24, 1954

# AFFIDAVIT OF WALDO S. CARRELL

STATE OF FLORIDA,

County of Gadsden.

WALDO S. CARRELL, being first duly sworn, deposes and says that he is a resident of Quincy in Gadsden County, Florida, and is manager of the Quincy Chamber of Commerce.

In the performance of affiant's duties as manager of the Quincy Chamber of Commerce, affiant has had occasion to make surveys of commerce in Quincy and in Gadsden County.

18 The population of Gadsden County, according to the official U. S. Census of 1950, was 36,457, including the inmates and attendants at the State Hospital in Chattahoochee. The farm population in Gadsden County for 1951 was 13,400. The population of Quincy according to the U. S. Census of 1950 is 6505.

The reliable estimates, accepted in commercial circles, place the income of the population of the entire county for 1951 at \$25,796,000.00. Of this amount \$15,393,000.00 is estimated to be the farm income of Gadsden County.

In Quincy, and within a radius of one mile of the corporate limits, there are approximately 1568 wage earners. Of this number, more than half, or approximately 2415 are employed on farms in tobacco warehouses, and in the business of farm supply, including the sale of fertilizers, agricultural chemicals, farm machinery and implements and seed. Approximately 1460 of the total number employed in Quincy and within one mile of the corporate limits are actually employed on farms, either the year-round or seasonally. Approximately 2140 of the total number employed in the same area, the year-round or seasonally, actually reside on farms.

In a recent survey made by affiant, the proprietors or managers



of 78% of the business establishments in Quincy State that their business is dependent directly or indirectly upon agriculture.

In affiant's opinion the town of Quincy is an agricultural community.

WALDO S. CARRELL.

19 Sworn to and subscribed before me this 4 day of August, 1952.

WILLIAM D. LINES,  
*Notary Public*

(N. P. Seal)

My commission expires April 24, 1954.

In United States District Court

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.—Filed August 29, 1952

Comes now the plaintiff in this cause, Maurice J. Toffin, Secretary of Labor, United States Department of Labor, through his attorneys and in response to defendant's motion for summary judgment filed heretofore in this cause says that:

I. This Court does not have before it in the present record facts, which would be admissible in evidence and which are presented by one competent to so testify, upon which it can conclude beyond doubt and solely as a matter of law that defendant is entitled to summary judgment in this cause.

20 II. Defendant has not presented sufficient facts, which would be admissible in evidence and which are presented by one competent to so testify, for this Court to rule that defendant has sustained the burden of proof it bears of proving beyond doubt that the exemption contained in Section 13(a)(6) is applicable to its employees referred to in the complaint.

III. The Defendant has not presented sufficient facts, which would be admissible in evidence and which are presented by one competent to so testify, for this Court to rule that defendant has sustained the burden of proof it bears of proving beyond doubt that the exemption contained in Section 13(a)(10) is applicable to its employees referred to in the complaint.

IV. The Defendant has failed to show such facts, as would be admissible in evidence if presented by one competent to so testify, which establish that the basic requirements of Section 13(a)(10) have been met or that the Administrator's Regulation defining the "area of production" as used in Section 13(a)(10) is so lacking support and is so unreasonable as to be arbitrary, capricious and invalid.

IV. There are in the present state of the case serious and genuine disputes as to many material facts which can only be resolved by a full and complete trial of the issues.

(a) Plaintiff asserts that defendant does not qualify as a "farmer" within the meaning of Sections 13(a)(6) and 3(f) of the Act.

(b) Plaintiff asserts that the operations performed on the tobacco by defendant at the packing houses are not practices performed by a farmer as an incident to or in conjunction with its farming operations within the meaning of Sections 13(a)(6) and 3(f) of the Act.

(c) Plaintiff asserts that after the bulking or fermentation operations are commenced on the tobacco, the tobacco is no longer in its raw or natural state and that therefore the exemption contained in Section 13(a)(10) of the Act is inapplicable to any of defendant's employees who handle or in any other manner work on the tobacco after it has undergone any bulking.

(d) Plaintiff asserts that after the bulking or fermentation processing activities have commenced the tobacco is no longer an "agricultural commodity" within the meaning of Section 13(a)(10) of the Act.

Wherefore, plaintiff prays this Court for an order denying defendant's motion for summary judgment.

Dated this 28th day of August, 1952.

(S.) WILLIAM S. TYSON,

*Solicitor,*

(S.) BEVERLY R. WORRELL,

*Regional Attorney,*

ROBERTSON H. HESSE,

*Attorney,*

*United States Department of Labor,*

*Attorneys for Plaintiff.*

STATE OF FLORIDA,

County of Pinellas, ss:

WILLIAM H. OLSON, JR., being first duly sworn, says:

That he is, and since February, 1941, has been, an investigator with the Wage and Hour and Public Contracts Divisions, United States Department of Labor, and since May, 1947, has been assigned to the investigation staff of the Regional Office for Region IV, said regional office of the aforesaid Divisions, having within its jurisdiction the state of Florida.

That on December 13, 1951, acting within his official capacity as investigator, he made an investigation of King Edward Tobacco Company of Florida, defendant in this cause, at which time he examined the defendant's records pertaining to the operation of its business, interviewed and conferred with various officials of defendant and interviewed various employees of defendant, and that from the materials he examined during this investigation, and from the above sources, he has acquired personal knowledge that as of the time of his investigation:

Defendant is an affiliate of Jno. H. Swisher & Son, Inc., and was incorporated under the laws of the state of Florida in March, 1949. As of January 7, 1952, defendant's corporate officers were:

- 23 Carl S. Swisher—President
- B. Ottinger—Vice-President
- Jack Vrieze—Vice-President
- C. J. Gunte—Treasurer
- V. C. Davidson—Secretary

B. (Bate) Ottinger, Vice-President of defendant, is an official of Associated Tobacco Growers & Processors Co., another affiliate of Jno. H. Swisher & Son, Inc. Jno. H. Swisher & Son, Inc., buys over 50 per cent of the yearly crop handled by the defendant and its affiliate.

Defendant corporation owns none of the farm lands, tenant houses, warehouses or the land beneath the warehouses (having a value in excess of one million (\$1,000,000.00) dollars) all of which are owned by Jno. H. Swisher & Son, Inc., and leased to its affiliate, the defendant, on an annual rental basis totaling for the year ending August 31, 1951, the sum of one hundred thousand (\$100,000.00) dollars. The only assets usually associated with a "farmer" which defendant corporation owns consist of certain furniture, automobiles, trucks, tractors, combines, work animals, irrigation systems and other such personalty.

Defendant operates three packing houses in and around Quincy, Florida, which it does not own but rents from Jno. H. Swisher & Son, Inc. Pertaining to the 1951 crop year, defendant bulked or "sorted" at these three warehouses a total of approximately 595,901 pounds of Type 62 shade-grown tobacco. Of this 595,901 pounds of said tobacco bulked by the defendant at the warehouses it had rented, a total of approximately 354,967

24 pounds had not been grown by defendant but had been purchased by defendant from other persons who had grown it, while only approximately 240,938 pounds, or about 40 per cent, of the total bulked by defendant in its rented warehouses was grown by defendant itself on the farms not owned by it but rented from Jno. H. Swisher & Son, Inc.

For the fiscal year ending August, 1951, and pertaining to the 1950 tobacco crop, the cost to defendant for the tobacco it purchased from others who had grown such tobacco and which it bulked in its rented warehouses was \$744,262.39; whereas the farm cost to defendant for growing tobacco on its rented farms was only \$482,709.80. During this period, and for this crop, the packing (bulking) cost was \$215,463.47 plus an "administrative cost" of \$62,643.06. The total cost to defendant for its operations on the 1950 crop of Type 62 shade-grown tobacco amounted to \$1,505,078.72 of which amount only \$482,709.80 or approximately 32 per cent was attributed by defendant to farm cost.

While there is common overall management of both farming and bulking operations through Mr. Jack Vnieze, each farm and each packing house is under the direct supervision of one superintendent who is responsible for the operation of his unit. Each superintendent has full authority to hire, fire and control the employees in his unit and each pays the employees under his control by means of checks transmitted to him from the main office.

Defendant has completely segregated all payroll and production records according to farm or packing house. Each farm and each packing house has its own separate and complete payroll and production records which are maintained by defendant's employees in its main office from primary records kept and turned in by the various superintendents. Production costs are maintained on a unit basis. There is an entirely different wage scale for both supervisory and non-supervisory employees as between the farm employees and the packing house employees.

(S.) WILLIAM H. OLSON, JR.

Sworn to and subscribed before me this 23rd day of August, 1952.

(S.) KINGLAND SMITH,

*Notary Public.*

(Seal)

My Commission expires: 3-25-55.

#### AFFIDAVIT OF ROBERTSON C. HESSE

State of Alabama,

County of Jefferson, ss:

ROBERTSON C. HESSE, being first duly sworn, says:

That he is one of the attorneys for the plaintiff in this cause, that he does hereby certify that the attached Exhibit "A" is a true and accurate copy of the biographical description of Wightman Wells Garner as it appears in Volume 25 of Who's Who in



26 American page 267; and that he has compared Exhibit "A" with the original and finds it to be a true and accurate copy thereof.

He further certifies that the attached Exhibit "B" contains true and accurate transcriptions from the book by said Wrightman Wells Garner, entitled, "The Production of Tobacco," and that he has personally compared said transcriptions with the original statements appearing in that book and finds them to be true and accurate.

ROBERTSON C. HESSE

Sworn to and subscribed before me this 28th day of August, 1952.

(S.) BERNICE L. CARPENTER

(Seal)

Notary Public.

My commission expires: 1-11-53.

#### EXHIBIT "A" TO AFFIDAVIT OF ROBERTSON C. HESSE

(Garner, Wrightman Wells,) chemist, plant physiologist, b. Timmonsville, S. C., July 15, 1875; s. James Nathaniel and Joanna (Wright) G.; S.C. Mil. Acad., 1892-93; A.B., U. of S.C., 1896; Ph.D. Johns Hopkins, 1900; Sc.D., Clemson Coll., and N. C. State Coll., 1937; M. Judith Goode, Nov. 8, 1905, Instr. chemistry, and pvt. asst. to Prof. A. Michael, Tufts Coll., Mass., 1900-03; scientific asst. Bur. chemistry, Dept. Agr., 1904; scientific asst. in tobacco investigations, 1905-08; physiologist in charge, tobacco and plant nutrition, investigations, 1909-40, principal physiol. in charge, tobacco investigations, Bureau of Plant  
27 Industry, Dept. of Agriculture, 1941-45; retired. Fellow A.A.A.S.; member American Chemical Society, Am. Genetic Assn., Bot. Soc. America, Am. Soc. Naturalists, Washington Academy Sciences, Am. Soc. Plant Physiologists (Stephen Hoes Award 1930), Am. Soc. Agronomy, Sigma Alpha Epsilon, Phi Beta Kappa, Episcopalian. Author scientific papers in American and foreign journals, and bulls., particularly on photoperiodism in plants, mineral nutrition of plants and tobacco production: "The production of Tobacco", in 1946. Home: 1367 Parkwood Pl., Washington 10, D. C.

#### EXHIBIT "B" TO AFFIDAVIT OF ROBERTSON C. HESSE

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#### Chemical Constituents of Tobacco

The morphology, structure, and chemical composition of the leaf may be said to determine the properties of the leaf and all

have important bearing on its quality. Qualitatively, tobacco leaf perhaps does not differ greatly from the leaf of other comparable plants except for its content of nicotine and closely related alkaloids. Quantitatively, the various commercial types of leaf tobacco differ widely among themselves in composition and there are important variations even in different crops of the same type. We are here chiefly concerned with qualitative aspects of composition, and quantitative relations are considered more fully in Chapter Twenty-one.

**Carbohydrates.** The various forms of carbohydrate found in the mature leaf, considered collectively, constitute from 25 to 50 per cent of the total dry matter (Periki, 1934). The proportions of the several forms varies widely in the different types of tobacco but, in general, total carbohydrate is relatively high in cigarette tobaccos and low in the cigar types. The three major groups of carbohydrates to be considered are: (1) the reserve carbohydrates which enter more directly into the nutrition and metabolic processes of the cell protoplasm and include starch, dextrin, maltose, cane sugar, glucose, and fructose; (2) the hemicelluloses which enter largely into the make-up of the cell wall but, because of their capacity to yield sugars by mild hydrolysis, may also function to some extent in cell nutrition, the two chief groups being pectins and pentosans; (3) the highly condensed stable forms, cellulose and lignin, which, together with the hemicelluloses, furnish the framework of the leaf but ordinarily play no part in nutrition.

Although in the case of the tobacco leaf not all of the individual members of the reserve carbohydrate group mentioned above have been actually isolated and identified, there seems to be no reason for doubting that all of them are present at one time or another as products of assimilation and dissimilation. Application of the usual methods for quantitative determination of the several carbohydrate fractions indicates that this is the case. Starch and invert sugar, however, are the most important components of the reserve group of carbohydrates.

Pectin occurs in the leaf in considerable quantity and the pectic acid isolated from it seems to have about the same composition as the pectic acid from flax. When broken down it yields methyl alcohol, acetic acid, galacturonic acid, and pentose sugar (Neuberg and Scheur, 1931). Tobacco pectin is soluble only in small part in cold water. In addition to pectin, the tobacco leaf also contains small quantities of pentosan but little is known as to its exact composition. Cellulose as a major constituent of the cell wall occurs in important quantities in all parts of the leaf but is especially abundant in the midrib and lateral veins. In the ordinary routine analyses it constitutes the fraction designated as crude fiber, though this fraction usually is not pure

cellulose. In the case of the tobacco leaf apparently no study has been made of the process of lignification whereby in the later stages of development the cell wall is hardened by the formation of the substance known as lignin, which differs materially from both pectin and cellulose. Since lignification is largely confined to the vascular system, however, it is to be expected that the content of lignin in the leaf lamina would be relatively low. The woody portion of the stalk, on the other hand, undoubtedly has a high content of lignin.

**Nitrogenous Compounds.** There is wide variation in both the total nitrogen and its distribution between the various forms in which it is found in tobacco. In the green leaf by far the largest component is the protein fraction while, in most cases, nicotine ranks second in importance, especially in the later stages of leaf development. In the cured leaf the decomposition products of protein increase and may even exceed the residual protein content. Very little has been done in the isolation and identification of specific proteins in tobacco. An interesting exception is the tobacco-mosaic virus protein, which has been isolated in crystalline form and extensively studied. Little is known as to the identity of the peptides and free amino acids but asparagine and glutamine have been found to occur in the leaf and these possibly are the only amides present, according to Vickery and associates (1937). In tobacco seed a globulin type of protein has been isolated in crystalline form and the soluble derivatives of protein, choline, betaine, adenine, guanine, allantoin, and arginine also have been identified by Vickery and associates (1932).

Nicotine, having the formula  $C_{10}H_{14}N_2$ , is the most characteristic chemical constituent of tobacco, though it has been recently reported that in strains of Maryland tobacco and certain other varieties having a low total alkaloid content nicotine is replaced as the chief alkaloid by the closely related normicotine  $C_9H_{12}N_2$ . Nicotine was first isolated from tobacco and its properties described in 1828. Except from a botanical viewpoint, it may be considered that a leaf devoid of nicotine or, possibly, its near relative, normicotine, is no longer to be regarded as tobacco. A number of secondary alkaloids in addition to normicotine have been reported as occurring in tobacco but, when present at all, these occur only in minute quantity. The distribution of nicotine in the plant organs at different stages of growth has been studied by Chuard and Mellet (1912). While nicotine is usually the dominant alkaloid in both ordinary tobacco (*Nicotiana glauca*) and *N. rustica*, in a large proportion of the wild species of *Nicotiana* normicotine is dominant. Nicotine is often present as a secondary alkaloid while, in a few of the wild species including *N. glauca* Griseb., a third, related alkaloid, known as anabasine,  $C_{10}H_{14}N_2$ ,

is the chief alkaloid (Smith and Smith, 1942). Nicotine  
31 has not been found in solanaceous plants outside of the  
genus *Nicotiana* but has been reported to occur in traces  
in *Asclepias syriaca*, a member of the *Asclepiadaceae* family.

Nicotine, in the pure state, is a colorless, rather mobile, oily  
liquid which soon darkens upon standing. It is slightly heavier  
than water, with which it mixes in all proportions at ordinary  
temperatures, and it is soluble in most ordinary organic solvents.  
Nicotine boils at about 247° C. At cool temperature it has little  
odor but when lightly warmed its vapors become quite irritat-  
ing. It is easily volatilized with steam. It is strongly alkaline and  
forms with acids monacid salts which are neutral and diacid salts  
having an acid reaction. Nicotine is chemically related to pyri-  
dine and, when oxidized, yields nicotinic acid which is 2-pyridine  
carboxylic acid. It is, in fact, a condensation product of pyridine  
and *n*-methyl pyrrolidine. It forms a precipitate with tannic acid  
and a very insoluble compound with salicylic acid. With  
picric acid it yields a difficultly soluble, crystalline dipicrate. Ma-  
ture tobacco seeds contain no nicotine but it promptly appears  
following germination and thereafter is present in all parts of the  
plant, including the seed in its early stages of ripening. It is  
most abundant in the leaf, although apparently it is synthesized  
at the root (Dawson, 1942).

As would be expected, ammonia is present in the green leaf in  
only a very small quantity but markedly increases in the pro-  
cesses of curing and fermentation. The presence of nitrate in the  
growing crop and the cured leaf depends primarily on the con-  
ditions of nutrition. With a sharply limited nitrogen sup-  
32 ply in the soil, the nitrate content of the crop will be very  
low, but with an excess nitrogen supply the plant is ca-  
pable of storing considerable quantities of nitrate. In the leaf the  
nitrate is found chiefly in the midrib and veins.

**Organic Acids.** These acids, especially nonvolatile polybasic  
acids, constitute an important fraction in the composition of the  
leaf though not all of those normally present have been identifi-  
fied. The metabolism of the organic acids of the tobacco leaf  
during growth has been investigated by Pucher, Wakeman and  
Vickery (1937). The content of malic, citric, and oxalic acids in  
tobacco has been rather extensively studied and usually malic  
acid is the most abundant of these. Oxalic acid is normally pres-  
ent as the calcium salt, and malic and citric acids also are largely  
combined with calcium, magnesium, and potassium. Fumaric,  
succinic, acetic, and formic acids also occur in the leaf. The com-  
plex aromatic compound, chlorogenic acid, and its two component  
quinic and caffeic acids, likewise have been reported to be pres-  
ent. Throughout the period of growth and development the leaf  
shows an acid reaction, as measured by hydrogen-ion concentra-



tion, the pH value rising from about 5.0 to 6.5, depending on conditions of nutrition and maturity. The cured and fermented product also has an acid reaction.

**Polyphenols.** Schinuck (1930) has studied the tannin-like substances, designated as polyphenols, which occur in important quantities in the leaf. These substances not only affect the color and other properties of the cured product but are believed by some to play an essential role in the oxidation-reduction processes of the growing plant incident to respiration, and in the subsequent curing and fermentation processes. The well-known substance, inositol, a sugar-like hydro-benzol, and the previously mentioned quinic acid, which appear to constitute links in the formation of polyphenols from sugar, have been isolated from tobacco by Schinuck (1930). With the exception of chlorogenic acid, little is known about the identity of the polyphenols or tannins of tobacco. In general, they are present as colorless constituents of the living cells of the plant, and are frequently designated as chromogens. In the dying or dead cells they produce red or brown colors by undergoing excessive oxidation because they are hydrolyzed by ferments no longer subject to orderly control and are freely exposed to the oxygen of the air. These polyphenols are commonly present in the living cell in the form of glycosides which split off sugar when hydrolyzed. Unfortunately, accurate methods are not available as yet for quantitative determination of the polyphenols.

**Chlorophyll and Other Pigments.** In the growing plant the green chlorophyll pigments are of outstanding importance and with certain exceptions, as in the case of the White Burley variety, they more or less completely mask all other pigments present. Always accompanying the two green pigments, chlorophyll a and chlorophyll b, are the two yellow pigments, carotene and xanthophyll, frequently spoken of as carotinoids. The yellow pigments come clearly into evidence only as the green chlorophylls begin to disappear, as in the ripening of the leaf and especially in the early stages of curing. The yellow pigments, however, definitely contribute to the brilliance of the original green color of the leaf. The intensity and brilliancy of the green in the fresh leaf depend largely on the variety of the tobacco, the conditions of nutrition, and the age or maturity of the leaf. It has been found by Nagel (1939) that differences in the ratios of chlorophyll a and chlorophyll b, of carotene to xanthophyll and of the sum of the green pigments to the sum of the yellow pigments may be involved. In addition to carotene and xanthophyll, the pigment of the flavone group, known as rutin, according to Hasegawa (1931), and possibly still other pigments also contribute to the pure yellow color that normally develops in the first stage

of curing, as the green chlorophyll is destroyed through process of oxidation.

The reddish or brown coloration which commonly develops in the second stage of the curing (except in typical flue-curing), or even in the field is caused by oxidation of the above-mentioned polyphenols and other glycosides, including rutin. It appears that by gradual oxidation the last named compound develops, successively, a yellow, red, and brown color, the seat of action being in the epidermal cells of the leaf rather than in the mesophyll.

**Ethereal Oils and Resins.** These products embrace two highly important but complex and little understood groups of constituents which apparently furnish the true aromatic principles of tobacco. The ethereal oils and the resins occur in the glandular hairs of the leaf, and the sticky gum which collects on the hands of workmen handling the green leaves is composed chiefly of fragments of the hairs and their content of the ethereal oils, resins, and plant wax. By steam distillation of green or cured tobacco leaves, or extracts obtained from them with organic solvents, investigators have repeatedly obtained small quantities of ethereal oils. These have been more or less complex mixtures, apparently containing hydrocarbons of the terpene group, phenols and esters of unknown composition. Apparently the essential oils of tobacco flowers are similar to those of the foliage leaves.

Similarly, by extraction with alcohol, saponification, and precipitation with acids and bases, the resin component has been variously fractionated into complex groups of resin acids, esters, alcohol or resinols, and the indifferent resenes, but in no case have the individual members of these groups been isolated and identified. The resins are believed to be formed from the ethereal oil with which they are closely associated, by processes of oxidation and condensation. The resins are soluble in alcohol. The resene fraction forms a partly solid, sticky mass of yellow to reddish-brown color and possesses an agreeable honeylike aroma. The resin-acid complex has been separated into three fractions, which have been designated as, alpha, beta, and gamma tobacco acids but none of these appears to possess a characteristic aroma. Accompanying the ethereal oils and resins are certain saturated paraffinlike hydrocarbons, sometimes designated as tobacco wax, which are soluble in hot alcohol but insoluble in cold alcohol. This soft wax, which is present in the leaf to the extent of 0.5 to 1.0 per cent, is composed essentially of the hydrocarbons heptacosane,  $C_{27}H_{56}$ , and hentriacontane,  $C_{31}H_{64}$ , in approximately equal proportions, and has a melting point of  $66^{\circ}C$ . This product develops no aromatic properties when heated and appears in tobacco smoke as air colloids (Pyriki, 1942, b).

36 **Enzymes.** Present knowledge of the many enzymes or ferments which govern metabolism in the tobacco plant

throughout its growth and development and in the subsequent curing and fermentation of the leaf is rather limited. This is especially true, perhaps, with respect to nitrogen metabolism. Experimental evidence has been presented, however, to show the presence in the cured leaf, even when the fire-curing method has been applied, of protease, lipase, emulsin, amylase, invertase, phosphatase, glycolase, pectase, ketone-aldehyde shuttle, oxidase, peroxidase, catalase, and reductase.

**Mineral Constituents.** As compared with most other crop plants, tobacco has a high content of ash, that of the leaf usually ranging from 12 to 25 per cent. The quantity and the composition of the mineral component are of importance not only because of their influence on growth and development of the plant but also because of their decided effect on the combustibility and other elements of quality in the leaf. The content of ash in the mature leaf is much higher than that of the stem and root, the ratio of distribution between the three parts approximating 12:7:5. Under favorable conditions the plant may absorb the essential elements in much larger quantities than are required for normal growth and also may absorb appreciable quantities of elements which are not essential for normal growth and development. The latter elements may be beneficial, innocuous, or they may be definitely toxic. The comparative content of the principal mineral constituents of the leaf is illustrated by the data of Bailey and Anderson for Connecticut cigar-binder tobacco (1928).

37. The number of elements recognized as being essential for normal growth of tobacco has been considerably increased as a result of recent research, and it may well be that eventually still others will be found to be required in extremely small quantities (McMurtrey and Robinson, 1938). The essential mineral elements may be conveniently divided into two groups, namely, those required in relatively large quantities, and therefore spoken of as macro nutrient, and a second series commonly spoken of as micro nutrient elements, because they are needed only in minute quantities. The members of the first group, which have long been recognized as being indispensable to the plant, are calcium, magnesium, phosphorus, potassium, and sulfur. Other elements commonly found in the ash in considerable quantity but not known to be indispensable to the plant are sodium, silicon, and chlorine.

Calcium is the leading constituent of the ash in point of quantity, except that potassium frequently assumes that position when there is a liberal supply in the growing medium. These two elements constitute 50 per cent or more of the ash. Magnesium, phosphorus, and sulfur are present in much smaller proportions and, of these, the content of phosphorus is usually lowest.

At the present time, the group of micro nutrient elements actually demonstrated to be essential for the tobacco plant consists of boron,



iron, manganese, zinc, and copper. In contrast with the group of macro elements, the micro elements may become highly toxic to the plant when present in the culture medium in soluble form even in relatively low concentrations. Consequently, the content of these elements in the crop is always very low. This is especially true with respect to boron, zinc, and copper. Aluminum, which is normally present in the leaf to the extent of less than 0.1 per cent of the dry weight, is not regarded as being essential. Among other elements which have been shown to occur in tobacco in very small quantity but not regarded as essential are barium, lithium, and iodine. Arsenic has been found in significant quantities in some manufactured tobacco but this has been regarded as due primarily to applications of arsenicals to the crop in the field for insecticidal purposes.

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On the other hand, thorough curing and fermentation tends to darken the leaf but, at the same time, materially reduces its content of nicotine. Color in tobacco is dependent on many factors but soil texture, nutrition conditions during growth, the maturity of the leaf, and the rate and conditions of curing are especially important.

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#### Taste

The tobacco leaf, after curing, has a raw, astringent, bitter taste. After fermentation or aging the taste is much less harsh but the bitterness remains, at least in part. There is a wide variation in the degree of bitterness but the factors involved are not definitely known. In the case of some cigar tobaccos, droplets of a black, intensely bitter fluid may be formed on the end of the cigar which is held in the mouth in smoking. Tobacco contains appreciable quantities of glycosides and, since these substances commonly have a decidedly bitter taste, it is possible that they are responsible for the bitterness of the leaf.

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#### Fermentation or Sweating of Tobacco

Before the freshly cured leaf is fit for human use it must undergo a fermentation or aging. There are no exceptions to this rule. This is the feature of tobacco production that is most commonly overlooked by amateurs who undertake to grow tobacco for home use. Tobacco is improved in many ways by this processing but the outstanding effects are development of the desired odor and aroma and elimination of the rawness or harshness and in part the bitter



taste which characterize all freshly cured leaf. The color of the leaf usually is improved, the general tendency being toward an evanescence of shade, disappearance of green shades, general darkening of the color, and, in some degree, dulling of luster. The gum of the leaf partially loses its sticky properties. Usually the combustibility of the tobacco is improved. Depending on the extent of the fermentation the elasticity may be reduced and in extreme cases the leaf tissues may be greatly weakened. If the fermentation is too severe or unduly prolonged, the improvements in aroma, color, and some other elements of quality initially obtained may be largely lost. It is quite important, therefore, that the fermentation be properly controlled and the requirements vary greatly with the different types of leaf. Fermentation in tobacco is often spoken of as "sweating," probably because of the tendency of the tobacco to become heated and to give off moisture in the process. Used in the broadest sense the term fermentation includes aging which essentially is but a relatively very slow form of fermentation. There can be no hard and fast distinction between fermentation as referring to a more or less rapid, vigorous action, with considerable evolution of heat and the slow process of aging, for these are all degrees of fermentation and probably different types of fermentation are at times involved.

Typical tobacco fermentation is but the resumption of reactions taking place in the later stages of curing in the barn that have been temporarily suspended by the drying out of the leaf. By use of air conditioning on a large scale it has been demonstrated that excellent results in fermentation immediately following the curing can be obtained without in any way disturbing the tobacco as it hangs in the curing barn. The outstanding factor controlling the character, rate, and extent of the fermentation is the moisture content of the leaf. Like the curing, the rate of fermentation also depends on the temperature. Accordingly, although with sufficient moisture tobacco will ferment while hanging in the barn the rate will be very slow unless the temperature of the air is raised. Normal fermentation is a process of oxidation and an adequate supply of air is required, but in its absence a modified anaerobic type of activity will take place. Finally, the capacity of the tobacco to ferment and the extent of the process depend on the type of leaf involved, the conditions under which it was produced, and the amount of the tobacco mass, its degree of compactness, and other physical characteristics.

The moisture content of tobacco at the beginning of the fermentation or aging process is extremely variable and for the most part is not accurately controlled except in the domestic cigarette types and other types as exported to the United Kingdom. Where the moisture content is excessive, serious losses frequently

result from decay of the leaf by microorganisms, this decay, being known as black rot. In cigar tobaccos the initial content of moisture usually varies from 20 to 30 per cent or more while a content of about 25 per cent is required for best results. In the heavy fermentation of low-grade cigar leaf to be used for chewing purposes, however, the content of moisture may be as high as 40 per cent. The dark air-cured and fire-cured types except when intended for export to the United Kingdom are packed for fermentation with moisture contents ranging from 14 to 22 per cent. Burley and flue-cured leaf for domestic manufacture are packaged for aging with an average content of moisture of about 10 to 13 per cent. Flue-cured and other types destined for the United Kingdom are packed with about 11 per cent moisture, because of the heavy import duties on tobacco and the additional duty that is imposed if the moisture content falls below 10 per cent.

In preparation for fermentation or aging, tobacco is usually pressed into standard containers or forms—namely, boxes or cases, hogsheads, and bales—or it is placed in large piles or bulks in a warehouse having facilities for at least partial control of temperature and humidity. In the open bulks the condition of the tobacco is more easily followed than in the closed containers so that somewhat higher moisture contents can be safely used. Active fermentation is a strongly exothermic process and unless the heat is dissipated as rapidly as formed, the temperature of the tobacco rises and the fermentation process becomes self-accelerating. Naturally, this temperature rise is most pronounced in the large masses or bulks of tobacco since these more effectively retain the heat as released. Himeke (1908) has studied temperature relations in tobacco bulks as affected by various factors. If adequately insulated, as in Dewar flasks, very small masses of tobacco show the characteristic rise in temperature. A matter of great practical importance is the fact that when packed in cases or in hogsheads in quantities of 500 to 1000 pounds or more and stored in warehouses, tobacco remains practically dormant as long as the air temperature continues below approximately 60° F., whereas active fermentation, often with decided rise in temperature in the tobacco, develops at higher room temperatures. This is the explanation of the well-known spring sweat which begins with the seasonal rise in air temperature. That fermentation is largely a process of slow combustion is indicated by the evolution of carbon dioxide and the absorption of oxygen. When tobacco is fermented in the absence of oxygen, as in a sealed container, much ammonia is formed, and the product fails to develop or to retain a normal aroma.

The high-nitrogen, low-carbohydrate types of tobacco, especially the cigar tobaccos, normally develop the most rapid, active, and

deep-seated sort of fermentation. The cured tobacco, on the other hand, only passes through a very slow, long-continued process of aging and the process is seasonal, depending on natural change in temperature of the air. A given type of cigar tobacco, however, shows decided differences in readiness with which it ferments, depending on the conditions of production. In general, a crop produced in a wet season ferments very readily and rapidly, with sharp rise in temperature, whereas a dry weather crop usually is much less active, showing little tendency to develop the normal rise in temperature. The upper, less mature leaves of the plant ferment more vigorously than the fully mature lower leaves. Large masses of tobacco develop a rise in temperature more rapidly than smaller ones and the fermentative activity also may be increased by increasing the compactness of the mass within certain limits.

#### Bulk Sweating

The bulk method is applied generally to cigar tobaccos in foreign countries. A large portion of the domestic cigar binder leaf crop is given a preliminary fermentation in bales before packing for the case sweat.

All shade-grown cigar wrappers, the Florida sun-grown cigar filler and Florida binder leaf, fire-cured leaf for Italian cheroots, and most of the filler leaf for the short-filler cigars, the stemming grades of leaf for crab chewing, and some small tobaccos are fermented by the bulk method. The methods used vary with the type and grade of leaf. They range from the very careful and precise methods required in handling the delicate and high-valued shade wrappers, to those faster methods employed with the cheaper tobacco, where large quantities are handled quickly and tearing or breakage is not so important (Fig. 74). Most of the cigar leaf destined for grinding for the short-filler cigars and stemming leaf usually undergoes an initial bulk sweat in the bundle or bale where many thousands of pounds may be piled together. After this initial sweat which lasts 6 to 12 months or longer, the piles are broken, the bundles are opened, the leaf is sprayed or dipped in water to restore the moisture content to the optimum amount. The tobacco is then repiled either in a tangled mass or shingled layers and there follows an immediate temperature rise indicative of active fermentation.

In nearly all cases, however, neither the bulk method nor the case sweat as initially carried out is sufficient to prepare cigar tobacco for manufacture. After the final packing in cases, bales or other packages, the leaf commonly undergoes further aging. For one or two years or longer and prior to use, domestic cigar



filler is subjected to vigorous sweating after adding more moisture. This process was investigated by Kraybill (1910).

The bulks of tobacco are rectangular in form, usually, having a width of 6 ft., a length of 10 to 12 ft. or more, and a height of 5 to 7 ft. Such bulks contain 4,000 to 6,000 pounds of tobacco, having a moisture content of 20 to 30 per cent or more. In Sumatra the cigar-wrapper bulks may be made far larger, especially in rebuilding for the later stage of fermentation. The bulk is constructed on a matched-board platform raised about 4 in. above the floor, which may be covered with paper or loose leaf tobacco. The bulk is begun by laying the outer one or two rows, with the butts of the hands always pointing outward. Each succeeding row is laid shingle fashion, with the hands overlapping about half those of the preceding row till the first layer or course is completed. Each succeeding layer is completed in the same way, always beginning on the outside. One or more metal pipes may be laid on the bulk when half completed so that thermometers can be inserted for the purpose of following the temperature changes. The bulks are covered with canvas or rubber blankets to check the drying out of the tobacco. The temperature of the room is usually kept at 70°-80° F. or somewhat higher and the relative humidity should not be lower than 70 per cent. Under these conditions the temperature of the bulk should rise to 120° F. in five to seven days.

A temperature of about 120° F. is in most cases considered the proper maximum for cigar wrapper and when this is reached the bulk is torn down and rebuilt. Cigar filler may be allowed to reach a temperature of 140° F. or even 150° F. The bulk is reconstructed in the same manner as in the first instance but the hands are redistributed so as to bring the outer hands of the old bulk near the center of the new one, thereby insuring more uniform fermentation. Because of heat losses from the outer portions, the temperature is not the same in all parts of the bulk, the highest temperatures occurring in the central areas. Temperature distribution through the various portions of the bulk has been studied in detail by Vriens (1912). After each rebuilding of the bulk temperature rises more slowly and fails to attain the previous maximum unless additional water has been added. Usually three to five turnings of the bulk are required to complete the fermentation.

In addition to the generation of heat, active tobacco fermentation is characterized by rather rapid evolution of carbon dioxide, with a corresponding absorption of oxygen from the air. Ordinarily the ratio of carbon dioxide to oxygen tends to become unity but since the tobacco is rather compact the accumulation of carbon dioxide within the bulk may become quite high. Under



Under these conditions the fermentation may become anaerobic in type. Under these conditions the carbon dioxide liberated may exceed the oxygen absorbed. Because of the marked difference in the room temperature and that of the interior of the bulk a limited amount of air circulation may be expected. Apparently the specific gravity of the carbon dioxide formed also is a factor in internal gas movement and it has been found that there is a downward drift of this gas so that the highest concentration usually occurs in the lower portion of the bulk. The distribution of carbon dioxide in the tobacco bulk has been studied by Jensen (1908). While the evolution of heat is closely associated with the carbon dioxide formation there is an appreciable lag between the rise in carbon dioxide formation and the corresponding rise in temperature because of heat absorption by the tobacco. It is a striking feature of tobacco fermentation, especially where small masses are involved, that the formation of carbon dioxide is very rapid during the first 12 to 24 hours, after which there is a decided decline in rate to a comparatively low level which may be maintained for a prolonged period.

The extensive formation of carbon dioxide, with evolution of heat, implies loss in the organic portion of the dry matter composing the leaf. Only very limited data are available as to the amount of this loss which in any case is variable, depending on the type of tobacco and the vigor and duration of the fermentation. Cigar wrapper, which is given a comparatively mild sweat, apparently undergoes a loss in dry matter of the order of 5 per cent. With the heavier sweat usually given cigar-filler tobacco, the loss in dry matter may reach 10 or 12 per cent or more. The slow aging of cigar tobacco which frequently follows the active fermentation will entail an additional small loss while resweating after addition of water to the tobacco will result in important additional losses. There is also a notable loss of moisture in the fermentation which often exceeds the loss in dry matter. This loss is probably due chiefly to the increased vapor pressure resulting from temperature rise, and to the fact that the fermentation renders the leaf less hygroscopic. No comprehensive studies of the chemical changes occurring in the fermentation have been reported but in the cigar tobaccos, which are high nitrogen types, prone to undergo very active fermentation, it appears that the nitrogenous constituents as a whole are most active. Some of the changes taking place in active fermentation have been reported by Behrens (1894). Protein nitrogen undergoes but little change except in heavy sweating and in rather drastic resweating but there is a decided decrease in amino nitrogen and an increase in ammonia. There is an important loss of nicotine, commonly ranging from 15 to 25 per cent or more of the total originally present.

It appears that nitrates may be formed during the fermentation. Cigar tobaccos usually contain very little starch or sugar if any, at the end of the curing process, but when present these undergo further losses in the fermentation. Both citric and malic acids are subject to substantial losses. In the milder type of fermentation cellulose and other cell wall components undergo little change. In view of the general tendency toward development of darker colors it seems likely that the polyphenols undergo oxidation to a greater or less degree. It has been observed that the physical constants of the ethereal oils are modified in the course of the fermentation and some investigators have observed decreases in the content of tobacco resins.

#### Pages 426-429

#### Cause of Tobacco Fermentation

Although the effects of moisture, temperature, and other environmental factors on fermentation and the nature of the chemical changes taking place have received considerable attention by investigators, chief interest has always centered on the causal agency or agencies concerned in initiating and controlling the chemical processes. One school of thought has been that only the processes of oxidation which do not require the intervention of catalysts are involved; a second theory supposes that iron contained in the tobacco functions as a catalyst; according to a third group of workers the fermentation is due to the activities of microorganisms, including both bacteria and fungi; according to a fourth theory the fermentation is produced by the action of the intra-cellular enzymes of the leaf. For nearly 50 years there has been a spirited controversy between the adherents of the two last-named theories and a fairly extensive literature has developed on the subject. The microbial theory was at one time extended to include the concept that by appropriate transfer of specific microorganisms the fine aroma characteristic of one type of tobacco could be developed in other inferior types. This conception was advanced by Siebsland (1891).

That metabolism in the living leaf is controlled primarily by a host of specialized enzymes contained within the cells is not open to question, and it has been demonstrated that many of these enzymes are not permanently inactivated by the drying of the leaf tissues in the course of the curing. It is to be expected, therefore, that these enzymes will renew their activities, at least in part, where sufficient moisture is added to the leaf provided the appropriate substrate materials are present. The enzymatic theory of tobacco fermentation was first advanced by Loew (1899, 1901). To the extent that these enzymatic processes actually contribute to

the fermentation it is evident that it merely constitutes a continuation of transformations taking place in the curing and temporarily interrupted by the drying out of the leaf. On the other hand, many species of microorganisms are to be found on cured tobacco and with a sufficient supply of moisture and other conditions favorable the organisms may be expected to become active. The microflora of fermenting tobacco has been investigated anew in recent years by Johnson (1934) and by Reid, McKinstry, and Hiley (1935). The important question is whether or not the presence of microorganisms is essential to normal fermentation, that is, whether any chemical changes brought about by them are incidental rather than essential.

Efforts to study fermentation under sterile conditions have usually given conflicting or indecisive results because of the difficulties in sterilizing tobacco without injury to the intracellular enzymes. This appears to have been accomplished in certain cases, however, and the tobacco was found to retain without material impairment the capacity to produce carbon dioxide, with accompanying pyrogenesis and oxygen absorption, development of aroma and other characteristics of fermentation. In studies on the aging of fine-cured tobacco with a moisture content as low as 10 per cent, Dixon and associates (1936) found no evidence of significant growth of microorganisms. According to Smirnov (1927, a; 1927, b), susceptibility to attack by fungi and bacteria in tobacco, as in other media, depends primarily on the relative humidity of the surrounding air rather than the moisture content of the substrate. In the case of tobacco the reason for this is that the leaf varies in its content of constituents having antiseptic properties, such as the polyphenols. These constituents lose their antiseptic properties, however, when highly diluted, and may become good sources of carbon for molds. It was found that the optimum relative humidity for chrysmatic activity without intervention of mold is 70 to 75 per cent and 80 per cent is excessive. If the conclusions relative to antiseptic effects of polyphenols, which are based largely on observations with the Oriental types of tobacco, have general application they would largely explain the increased resistance of cigar tobaccos, with their high content of polyphenols, to attack by microorganisms.

It is claimed by Smirnov that the lower limit of relative humidity of the air (with the moisture content of the tobacco in equilibrium therewith) which will permit development and growth of molds is approximately 85 per cent. It appears that the corresponding limit for growth of bacteria on tobacco is definitely higher—about 96 per cent. These conclusions, as applied to Oriental tobaccos are based both on laboratory experiments and on observations in commercial warehouses. In the warehouses



the rise in temperature of the tobacco was in no manner related to development of molds. Development of good quality in the fermentation was always associated with absence of molds and a restricted relative humidity. Mold development was invariably associated with poor quality and excessive air humidity. The moisture content of tobacco in equilibrium with given relative humidities at given temperatures is subject to considerable variation, depending on the type and grade of tobacco and the conditions under which produced. The moisture content of air-cured tobacco in equilibrium with a relative humidity of 70 per cent at room temperature approximates 18 per cent and at a relative humidity of 80 per cent may be as high as 25 per cent. It is well known that the cured leaf would spoil under these conditions. Under similar conditions the moisture content of cigar tobacco probably would range from about 14 to 20 per cent, which would not be at all excessive for these types.

The evidence, as a whole, indicates that the essential transformations taking place in the fermentation—namely, removal of the rankness or rawness common to all unfermented tobacco, a mellowing of the product, development of aroma, loss of gum, and darkening of color—are of the same character under all types of fermentation and aging though possibly varying in degree.

52 These essential transformations can take place under conditions which preclude growth of microorganisms. In the more active types of fermentation, however, with a moisture content of the tobacco as high as 30 to 40 per cent, microorganisms doubtless bring about other transformations which in some instances are so deep-seated as to involve partial or even complete disintegration of the leaf tissue. For special purposes some of these secondary transformations may be desirable but in general they are not a part of the fundamental fermentative process.

#### DEPARTMENT OF COMMERCE TABULATION

April 18, 1952

I Herewith Certify That the attached typewritten table entitled "Employed Persons 14 Years Old and Over, by Major Industry Groups and Sex, for Quincy City, Gadsden County, Florida, April 1, 1950" was prepared from official tabulations of the returns of the Seventeenth Census of the United States, on file in the Bureau of the Census. These figures are preliminary and may not be in exact agreement with the distribution to be published in the final 1950 Census reports.

(Seal Impressed)

(S.) ROY PEEL

Director, Bureau of the Census



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## Department of Commerce

## Office of the Secretary

I Hereby Certify That Roy A. Peel who signed the foregoing certificate is now, and was at the time of signing, Director of the Census, and that full faith and credit should be given his certification as such.

In Witness Whereof, I have hereunto subscribed my name and caused the seal of the Department of Commerce to be affixed, this eighteenth day of April one thousand nine hundred and fifty-five.

For the Secretary of Commerce:

IS. J. GERALD RYAN,

Chief Clerk.

(Seal Affixed)

## Department of Commerce

## Bureau of the Census

Washington 25

April 18, 1952

Employed Persons 14 Years Old and Over, by Major Industry Groups and Sex, for Quincy City, Gadsden County, Florida:

April 1, 1950.

Major Industry Group	Number
Male, employed	1,676
Agriculture, forestry, & fisheries	212
Mining	43
Construction	190
Manufacturing	390
54   Transport, common, & other public util.	72
Wholesale and retail trade	403
Finance, insurance and real estate	55
Business and repair services	31
Personal services	105
Entertainment and recreation services	21
Professional and related services	69
Public administration	68
Industry not reported	17
Female, employed	1,012
Agriculture, forestry, & fisheries	193
Mining	1
Construction	3
Manufacturing	142
Transport, common, & other public util.	13

Major Industry Group	Number
Wholesale and retail trade	186
Finance, insurance, and real estate	13
Business and repair services	4
Personal services	258
Entertainment and recreation services	9
Professional and related services	152
Public administration	25
Industry not reported	41

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In United States District Court

PLAINTIFF'S MOTION TO STRIKE AFFIDAVITS SUPPORTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—Filed August 20, 1952, as follows:

Plaintiff, Maurice J. Tobin, Secretary of Labor, United States Department of Labor, moves the Court to strike the affidavit of Waldo S. Carroll attached to defendant's Motion for Summary Judgment filed heretofore in this cause.

For grounds of this motion, plaintiff says:

1. That the affidavit does not comply with the requirements of Rule 56(c), Federal Rules of Civil Procedure, either in form or contents since Rule 56(c) unequivocally requires that the affidavit must be made on personal knowledge and the affidavit does not set forth or establish that affiant has such personal knowledge of the matters set forth therein.

2. (a) That Rule 56(c) specifically requires that such an affidavit "shall set forth such facts as would be admissible in evidence" (emphasis supplied) and said affidavit fails to comply with that requirement in that the matters set forth therein are immaterial and irrelevant to the issues in this cause and therefore would be inadmissible in evidence.

56 (b) That said affidavit is inadmissible and of no effect since the statements of affiant contained therein do not constitute the best evidence of the facts sought to be established therein.

3. That the affidavit contains many ultimate conclusions of fact and beliefs without setting forth the facts themselves upon which said conclusions of fact and beliefs are predicated.

4. That affiant in his affidavit seeks to give opinion testimony as an expert and he has not been qualified to testify as an expert. Furthermore, even had affiant been properly qualified, his opinion, as distinguished from a statement of fact, should be stricken under the express terms of Rule 56(e).

Plaintiff, Maurice J. Tobin, Secretary of Labor, United States Department of Labor, further moves the Court to strike the follow-

ing portions of the affidavit of J. D. Vigeze attached to defendant's motion for summary judgment filed heretofore in this cause for the reasons hereinafter assigned.

1. That portion commencing at the bottom of the first page of said affidavit which reads as follows: "It is grown only in Gadsden, Leon and Madison Counties, Florida, and in DeCATUR and Grady Counties, Georgia, and nowhere else in the world, unless in quantities that are inconsequential". The grounds for striking said portion are (a) that the affidavit does not establish that affiant has personal knowledge of these matters, (b) that such statement represents a conclusion of facts, and (c) that the matter is hearsay evidence and therefore inadmissible.

57 2. That portion commencing at line 5 on the second page of said affidavit which reads as follows: "The cost per acre of production, and the price per acre which the farmer receives for his crop, are to my knowledge the highest of all agricultural crops produced in the United States, with the exception of other types of wrapper tobacco grown in other sections of the country". The grounds for striking said portion are (a) that the affidavit does not establish that affiant has personal knowledge of the matters therein set forth, (b) that such matters represent conclusions of fact and not facts themselves, and (c) that affiant's statements of these matters do not constitute the best evidence of the matters set forth therein and purporting to be facts.

3. That portion commencing at line 6 on the third page of said affidavit which reads as follows: "The annual production of all agricultural products in Gadsden County, Florida, amounts to approximately \$12,000,000.00, including all crops, cattle and other farm products". The grounds for striking said portion are (a) that it is not set forth or established in the affidavit that affiant has personal knowledge of such matters, (b) that said affidavit does not establish that affiant is competent to testify to such matters, (c) that affiant's statements of these matters do not constitute the best evidence of the matters set forth therein, and (d) that such matters are immaterial and irrelevant to the cause at issue and therefore would be inadmissible as evidence.

4. That portion commencing at line 13 of the third page of the said affidavit which reads as follows: "Gadsden County, Florida, is an agricultural County and the town of Quincy is a predominantly agricultural community, the majority of whose  
58 inhabitants gain their livelihood from and depend upon agriculture". The grounds for striking said portions are (a) that the affidavit does not set forth or establish that affiant has personal knowledge of said matters, (b) that nowhere in the affidavit has affiant been qualified as competent to testify as to such matters, (c) that such matters are clearly conclusions of fact, opinion and belief

and as such do not meet the requirement of Rule 56(e) that an affidavit shall and must set forth facts only, and (d) that affiant's statements do not constitute the best evidence of the matters set out therein and therefore would be inadmissible in evidence.

5: All the matters contained in that portion of said affidavit commencing at line 6 of the fourth page and continuing through the fifth, sixth and seventh pages of said affidavit which pertain in any manner whatsoever to any and all internal changes in the tobacco leaf during its growth or subsequent handling, processing, curing or bulking. The grounds for striking said portions are (a) that the affidavit nowhere establishes that affiant has personal knowledge of such matters set forth therein, (b) that these matters by their own terms establish that they relate to internal chemical changes in the tobacco leaf and it is obvious that affiant has not been qualified as an expert so as to be competent to testify as to these chemical changes, (c) that whether the leaf is in its raw or natural state is a conclusion of fact and law to be resolved from competent testimony concerning the chemical and other changes occurring in the leaf during the growing, curing, bulking and other processing activities, and (d) that the statements by affiant contained in his affidavit would not be admissible in evidence and therefore do not comply with the mandatory requirements of Rule 56(e).

Wherefore, plaintiff prays this Court for an order striking the affidavits or portions thereof as set forth hereinabove.

Dated: August 28th, 1952.

(S.) WILLIAM S. TYSON,  
*Solicitor.*

(S.) BEVERLEY R. WORRELL,  
*Regional Attorney.*

(S.) ROBERTSON C. HESSE,  
*Attorney, United States Department of Labor,*  
*Attorneys for Plaintiff.*

Post office address:

Office of Solicitor,

U. S. Department of Labor,

1908 Center Building,

Birmingham 3, Ala.



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In United States District Court

AFFIDAVIT OF ROBERT F. GARDNER—Filed September 2, 1952

STATE OF FLORIDA,

County of Gadsden:

Robert F. Gardner, being first duly sworn, deposes and says that he is a citizen and resident of Quincy, in Gadsden County, Florida, and is employed as Manager of King Edward Tobacco Company's Warehouse No. 1 in the City of Quincy, and has been so employed since a date prior to January 25, 1950:

That the work of employees in such warehouse at all such times, in addition to the bulking or bulk sweating of tobacco, included and includes also the sorting and baling of the leaf, but not stemming,—all such tobacco being baled and marketed by defendant without stemming:

That this type of cigar wrapper tobacco (U. S. No. 62), a shade grown tobacco grown almost entirely in Gadsden County, Florida, and adjoining counties of Florida and South Georgia, is and was at all such times customarily and regularly marketed and ready for market only when bulked, sorted and baled, without stemming.

ROBERT F. GARDNER.

Sworn to and subscribed before me this 30th day of August, 1952.

WILLIAM H. MALONE,

*Notary Public, State of Florida at Large.*

(Notarial Seal)

My commission expires Feb. 24, 1954.

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In United States District Court

MEMORANDUM DECISION ON MOTION FOR SUMMARY JUDGMENT—

Filed October 1, 1952

In this case plaintiff seeks to enjoin defendant from alleged violations of the Fair Labor Standards Act of 1938, as amended (Title 29 U.S.C. 201 et seq.). Plaintiff alleges that defendant employs approximately 120 employees in its packing house No. 1 in Quincy, Florida in the production of tobacco and pays such employees less than the minimum wages and fails to keep records required by the Act. In its answer defendant admits all the essential allegations of the complaint, except the alleged violations, which are denied and claims that its employees are exempt from the Act under Section 213(a) Clauses (6) and (10).

The answer alleges that defendant is a "farmer" growing cigar leaf tobacco on its own tobacco farms in Gadsden County, Florida and that all tobacco handled in its said packing house is tobacco grown exclusively on defendant's farms and that all of defendant's employees in said packing house were engaged in defendant's farming operations, including the preparation of such tobacco for market and also were engaged in such operations in an agricultural community in handling, packing, drying and preparing said tobacco for market.

62     Contending that the pleadings raised only legal questions defendant filed a motion for summary judgment to which were attached affidavits of two persons. In opposition thereto plaintiff filed a motion to strike the affidavits filed by defendant and also filed responses in the form of affidavits to defendant's motion for summary judgment.

The Court has carefully considered the legal questions raised by the pleadings and by the affidavits of the parties and is of the opinion that the factual questions presented by the pleadings are such that this case may not appropriately or safely be disposed of on motion for summary judgment and for this reason the motion will be denied.

There is also pending in this Court the case of Manner J. Tobin, Secretary of Labor, U. S. Department of Labor, plaintiff v. Joseph T. Budd, Jr. and Florence W. Budd, copartners, doing business as J. T. Budd, Jr. & Co., defendants, Tallahassee Civil Action No. 305. That case was instituted prior to this case, is at issue and would have been tried during the last fiscal year, but for the fact that plaintiff's agency ran out of funds and was unable to be represented at the hearing when the case was set down for trial. The pleadings in the Budd case and the pleadings and affidavits in this case make it clearly evident to the Court that the production of type 62 tobacco is limited to two small areas in Florida, one of these contiguous to Quincy and the other being contiguous to Madison, Florida. The pleadings in the Budd case disclose that in numbers of producers of type 62 tobacco more than 75% are small operators growing less than 25 acres of such tobacco annually and because of the  
63     size of their operations are individually unable to own and operate a packing house for their exclusive use and are therefore required to make arrangements with others for the drying, packing and preparing for market the cigar leaf tobacco produced by them.

The two cases now pending in this Court present the troublesome question of whether, under the terms of the Fair Labor Standards Act, all the producers of type 62 cigar leaf tobacco are exempt from the provisions of the Act, or whether some of them are entitled to exemption and others are not. The Court is, therefore, of the

opinion that the Budd case and this case should be consolidated for trial, and will be so consolidated, unless the parties are able to advance to the Court some valid reason why these cases may not be consolidated for trial.

The Court in disposition of the issues raised in these cases, now states for the information or counsel for all parties that it will be reluctant to extend the equity arm of the Court for the enforcement of any regulation promulgated by the Secretary of Labor under the Fair Labor Standards Act in a way that will exempt from the provisions of said Act those growers of type 62 tobacco who produce enough tobacco of this type to justify owning and operating a packing house for their exclusive use and to put the small growers out of business by making them subject to the provisions of said Act and the regulations promulgated thereunder.

64 The Court will set these cases down for a pre-trial conference with counsel for the respective parties on this occasion as soon as it is possible.

Dated at Tallahassee, Florida, this 1st day of October, 1952

(S.) DOZIER A. DEVANE,  
United States District Judge

In United States District Court

ORDER DENYING MOTION FOR SUMMARY JUDGMENT—Filed October 1, 1952

This cause coming on before the Court on defendant's motion for summary judgment and counsel for the respective parties having filed memorandum brief thereon, after due consideration thereof, the Court has filed herewith Memorandum Decision, and in conformity thereto, it is:

Ordered and Adjudged that said motion for summary judgment be and the same is hereby denied.

Done and Ordered at Tallahassee, Florida, this 1st day of October, 1952

(S.) DOZIER A. DEVANE,  
United States District Judge

65 In United States District Court

MOTION OF MAY TOBACCO COMPANY TO INTERVENE—Filed October 17, 1952

May Tobacco Company, a corporation duly organized and existing under the laws of Florida with its principal office in the City of Quincy in Gadsden County, Florida, hereby moves for leave to in-

tervene as a defendant in this action, in order to assert the defenses set forth in its proposed answer, tendered with this motion, on the ground that movant is a farmer and producer of Florida shade-grown cigar wrapper tobacco (U. S. Type No. 62), and also maintains and operates within the corporate limits of the City of Quincy, Florida, its own tobacco packing plant, in which plant the movant bulks, sorts and bales only tobacco which it raises on its own farms, exclusively.

And movant would show the Court that the plaintiff in the above entitled cause has contended and is now contending in said cause that the employees employed in such a packing house as that operated by movant are engaged in working on, sorting, tying and handling tobacco after it has been processed and put through the fermentation process, and that such work is not agricultural labor and is not incidental to or in conjunction with farming activities, and that such work is more akin to industry than to farming, and that the bulking and other operations carried on in such a tobacco packing plant in the City of Quincy is a distinct and separate industrial enterprise, that such bulking constitutes the first 66 step in a manufacturing process rather than the last step in a growing process. And plaintiff claims that the point of cleavage occurs at the receiving platform of the packing house and that at this point of delivery, the tobacco undergoes a metamorphosis from a farm product to a manufactured article.

Movant would also show to the Court that the plaintiff in the above entitled cause has contended and is now contending in said cause that such leaf tobacco during and after the bulking is not in its "raw or natural state" and is not an agricultural commodity but has undergone extensive and controlled processing, and that in such bulking process "is, in a sense, cooked" and is thus artificially changed and thereby becomes no longer an agricultural commodity.

And movant would further show the Court that the plaintiff in the above entitled cause has contended and is contending in said cause that such a tobacco packing plant, because it happens to be located in a city having a population in excess of 2500, is not within the "area of production" as that statutory term has been defined by the Administrator.

And, on such arguments, the plaintiff urges the Court to place all tobacco packing plants and all tobacco packing plant employees on an equal footing competitively and to thus avoid conferring a competitive advantage on one firm over another.

And so it is, that by such arguments on the part of the plaintiff, it is apparent that this suit, though in form a suit for injunction 67 against the named defendant, is in fact and in truth a test suit and is in substance and reality a suit seeking from the Court a declaratory judgment to be used as a precedent to



direct and control all such tobacco packing plants and all such tobacco packing plant employees and to place all such packing plants and all such packing plant employees on an equal footing competitively.

And so it is, movant would show unto the Court that movant has an interest in common with the defendant King Edward Tobacco Company of Florida in questions both of law and of fact that are presented for decision in this action and movant has a defense to the plaintiff's claim herein which would present to the Court both questions of law and questions of fact which are common to the main action.

Movant further moves the Court for leave to file the answer tendered herewith.

MAY TOBACCO COMPANY,

*Applicant for Intervention.*

By FRED L. MAY,

*President.*

MESSER & WILLIS,

BEN WILLIS,

*Applicant's Attorney.*

103-105 Midyette-Moor Building,

Tallahassee, Florida.

68 *Duly sworn to by Fred L. May, jurat omitted as printed.*

In United States District Court

ANSWER OF INTERVENOR, MAY TOBACCO COMPANY—Filed October 17, 1952

Comes now the intervenor May Tobacco Company, a Florida corporation, by its undersigned attorney; and for answer to the complaint herein says:

69 This defendant admits the allegations of paragraph I of the complaint, except that this defendant does not admit but denies that this defendant has violated or is violating the provisions of said Fair Labor Standards Act.

## II

Answering paragraph II of said complaint this defendant admits that this Court has jurisdiction to restrain violations of Section 15 of said Fair Labor Standards Act, but this defendant does not admit but denies that this defendant has violated or is violating any of the provisions of Section 15, or any other provision, of said Act.

## III

Answering paragraph III of said complaint, this defendant at all times hereinafter mentioned was and is a corporation duly organized and existing under and by virtue of the laws of the State of Florida, by virtue of which it is licensed to do business and is doing business at 104 East Washington Street in the City of Quincy, in Gadsden County, Florida, within the jurisdiction of this Honorable Court, where this defendant is engaged in the bulking, sorting and baling of cigar wrapper tobacco (U. S. Type No. 62), unstemmed.

## IV

(a) Answering paragraph IV of said complaint this defendant says at the height of the season, this defendant employs approximately seventy employees in and about its said tobacco packing plant, which is located at 104 East Washington Street in the City of Quincy, that such employees are engaged in the bulking, sorting, handling and baling of cigar wrapper tobacco, and this defendant admits that such operations constitute interstate commerce within the meaning of said Act, and that substantial quantities of such goods produced by this defendant's said employees have been and are being produced for interstate commerce and have been and are being shipped, delivered, transported, offered for transportation and sold in interstate commerce and shipped, delivered or sold with the knowledge that shipment, delivery or sale thereof in interstate commerce is intended from this defendant's said place of business and packing plant in the City of Quincy to other States.

(b) Further answering said paragraph IV of said complaint this defendant alleges that this defendant is a farmer, and that at all times mentioned in said complaint and herein this defendant was continuously and actively engaged in farming operations and was actively planting, cultivating, growing and harvesting tobacco on the farms of this defendant in Gadsden County, Florida, all located within a distance of not exceeding ten miles from this defendant's said packing plant in the City of Quincy, and that at all times mentioned in said complaint and herein the acreage of this defendant's said farms included about 2800 acres in the aggregate, including woodland, grazing land and general farm land, including an average of between 80 and 100 acres of cultivated tobacco "under shade"; that all tobacco stored, bulked, sorted, baled or packed or in any manner handled at defendant's said packing house in the City of Quincy is and was at all times mentioned in said com-

71 plant and herein none other than tobacco which was and is planted, cultivated, grown and harvested on this defendant's aforesaid farms and not on or from any other farm or farms, and this defendant further alleges that the employees of this defendant in its said packing house in the City of Quincy were engaged in work and practices all performed for and by this defendant as an incident to and in conjunction with this defendant's said farming operations, including the preparation of this defendant's said tobacco crops for market, unstemmed.

(c) Further answering paragraph IV of said complaint this defendant alleges, in the alternative, that this defendant's employees at and in this defendant's said packing house were at all times mentioned in said complaint and herein all employed in an agricultural community, and engaged in the handling, packing, storing, drying and preparing for market of cigar leaf tobacco in its raw or natural state, and that all such tobacco is and was at all times mentioned in said complaint and herein planted, cultivated, grown and harvested on and from the farms of this defendant located in Gadsden County, Florida, and within a distance not exceeding 10 miles from this defendant's said packing house in the City of Quincy.

(d) Further answering paragraph IV of said complaint this defendant alleges that of the 70 employees employed in said packing house at the height of the season, only 10% approximately of the total number of this defendant's employees employed in said packing plant live within the corporate limits of said City of Quincy and approximately 90% live outside the corporate limits of the City of

72 Quincy on the farms of this defendant in Gadsden County, Florida, or on adjoining or nearby farm lands, and during the season that said employees are engaged in said packing plant, it is the practice and custom of this defendant to furnish transportation and to transport said employees by automobile truck from their homes on the farms aforesaid into the City of Quincy to work in said defendant's packing plant.

(e) Further answering paragraph IV of said complaint this defendant alleges that for the past several years the total sales of tobacco by this defendant from its said packing plant in the City of Quincy have averaged between \$300,000 and \$350,000 per year, and that the total 1952 tobacco crop harvested from the farms of this defendant as aforesaid and bulked, sorted, baled and handled or to be bulked, sorted, baled and handled in this defendant's said packing house will amount to approximately 112,000 pounds, green weight.

## V

Answering paragraph V of said complaint this defendant alleges that this defendant has not violated and is not violating the pro-



visions of Section 6 or Section 15(a) (2) of said Act, either by paying to its said employees for their employment in the production of goods for interstate commerce as aforesaid, or in any other employment and that, on the contrary, the employees of this defendant in this defendant's said packing plant are exempt from the provisions of said Act under clauses (6) and (10) of Section 13(a) thereof.

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## VI

This defendant admits the allegations of paragraph VI of said complaint, but this defendant alleges that said regulations, or said Act, for the reasons and because of the facts hereinabove set forth, are not and were not applicable to the employees of this defendant in this defendant's said packing plant or to the activities of this defendant in said packing plant.

## VII

Answering paragraph VII of said complaint this defendant says that this defendant is not subject to the provisions of said Act, and alleges that this defendant has not violated and is not violating the provisions of said Act.

## VIII

This defendant admits the allegations of paragraph VIII of said complaint and admits that since January 25, 1950, this defendant has shipped, delivered, transported, offered for transportation and sold in interstate commerce and has shipped, delivered, or sold with the knowledge that said shipment, delivery or sale thereof in interstate commerce was intended, from its said place of business and packing plant in the City of Quincy, to other States, goods,—to-wit: unstemmed cigar wrapper leaf tobacco—but this defendant alleges the truth to be that this defendant has not violated and is not violating the provisions of said Act and alleges that this defendant and the employees of this defendant mentioned herein who were employed in this defendant's said packing plant have not been and are not being employed in violation of Section 6 of said Act or of any other provision thereof.

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## IX

Answering paragraph IX of said complaint this defendant alleges that this defendant has not violated and is not violating the provisions of said Fair Labor Standards Act.

Wherefore, this defendant prays judgment of this Honorable Court declaring that the employees of this defendant in this defendant's said packing plant in the City of Quincy are exempt from



the provisions of said Act under and by virtue of clauses (6) and (10) of Section 13(a) thereof.

MAY TOBACCO COMPANY,

*Applicant for Intervention.*

By FRED L. MAY,

MESSER & WILLIS,

BEN C. WILLIS,

*Applicant's Attorney,*

403-405 Midnette-Moor Building,

Tallahassee, Florida.

75. In United States District Court for the Northern District of Florida, Tallahassee Division

No. 340-T-Civil

MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF,

vs.

KING EDWARD TOBACCO COMPANY OF FLORIDA, A FLORIDA CORPORATION, DEFENDANT

MAY TOBACCO COMPANY, A CORPORATION, INTERVENER

No. 305-T-Civ.

MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF,

vs.

JOSEPH T. BUDD, JR. AND FLORENCE W. BUDD, CO-PARTNERS DOING BUSINESS AS J. T. BUDD AND COMPANY, DEFENDANTS

NOTICE OF HEARING—Filed November 14, 1952

To: All Counsel of Record

Please Take Notice that on Wednesday, December 10, 1952, at 10:00 o'clock A.M. in Chambers of the Hon. Dozier A. DeVane, Judge of said Court, in the U. S. Post Office Building in the City of Tallahassee, Florida, there will be a Pre-Trial Conference in the above entitled actions on a hearing on the Motion to Intervene of May Tobacco Company. By direction of the Judge of said Court.

76. Dated this November 10, 1952.

(S.) RICHARD J. GARDNER,

(S.) EDW. MCCARTHY,

*Attorneys for Defendant,*

King Edward Tobacco Company.

Affidavit of Service (Omitted in printing)

77 In United States District Court

ORDER ALLOWING INTERVENTION OF MAY TOBACCO COMPANY—  
Filed December 17, 1952.

This cause came on this day to be heard on the motion of May Tobacco Company, Inc., a corporation, for leave to intervene as a defendant in the above styled cause and for leave to file its answer rendered with said motion to intervene, and the argument of counsel for the respective parties having been heard, and the Court being advised of its opinion in the premises, it is thereupon, on consideration thereof,

Ordered and Adjudged that said motion be and the same is hereby granted, and, that said May Tobacco Company, Inc. be and the same is hereby made a party defendant in this cause and that the said answer rendered be filed and made a part of the pleadings in this cause.

78 Done and Ordered at Tallahassee, Florida this 17th day  
of December, 1952.

DOZIER A. DETANE,  
*United States District Judge.*

## In United States District Court

## STIPULATION FOR SUBSTITUTION OF PARTY PLAINTIFF—Filed February 11, 1953

It is hereby stipulated that Martin P. Durkin is now the duly appointed and qualified Secretary of Labor, United States Department of Labor, his appointment as Secretary of Labor by Dwight D. Eisenhower, President of these United States, having been confirmed by the Senate of these United States on January 21, 1953, and that said Martin P. Durkin has succeeded to all the rights, duties and functions heretofore vested in the plaintiff, Maurice J. Tobin, former Secretary of Labor, and that said Martin P. Durkin, Secretary of Labor, may be substituted herein as plaintiff in the place and stead of the said Maurice J. Tobin, and that an order may be entered herein to that effect and that this cause may be continued and maintained by said Martin P. Durkin, as Secretary of Labor.

79 Dated this 9th day of February, 1953.

WILLIAM S. TYSON,

*Solicitor,*

BEVERLEY R. WORRELL,

*Regional Attorney,*

ROBERT C. HESSE,

*Attorney,*

*United States Department of Labor,*

*Attorneys for Plaintiff.*

GARDNER AND LINES,

By RICHARD J. GARDNER,

*Attorney for Defendant.*

MESSER AND WILLIS,

By BEN C. WILLIS,

*Attorney for Intervener.*

## In United States District Court

## ORDER SUBSTITUTING MARTIN P. DURKIN AS PLAINTIFF—Filed February 11, 1953

The parties hereto having stipulated that Martin P. Durkin is now the duly appointed and qualified Secretary of Labor, United States Department of Labor, and that as such he has succeeded to all the rights, duties and functions of Maurice J. Tobin, heretofore appearing as the Secretary of Labor, United States Depart-

ment of Labor, and the plaintiff in this cause; and that  
 80 said Martin P. Durkin, Secretary of Labor, be substituted  
 as plaintiff herein in the place and stead of said Maurice  
 J. Tobin, it is

Ordered that Martin P. Durkin, Secretary of Labor, be and he  
 hereby is substituted as plaintiff herein in the place and stead of  
 Maurice J. Tobin, former Secretary of Labor, without prejudice to  
 the proceedings already had in this action; and that this cause may  
 be continued and maintained by said Martin P. Durkin, Secre-  
 tary of Labor.

Dated this 11th day of February, 1953.

DOZIER A. DEVANE,  
*United States District Judge.*

In United States District Court

STIPULATION OF FACTS—Filed August 3, 1953

Comes now the plaintiff and the defendant by their respective  
 attorneys and for purposes of this action, stipulate and agree as  
 follows:

1. That during the period of time involved in this action the de-  
 fendant, King Edward Tobacco Company of Florida, did employ,  
 and is employing, many of its employees engaged in the handling  
 of tobacco in and about its place of business known as packing  
 81 house No. 1 located at Quincy, Florida, at wage rates less  
 than seventy-five (75) cents an hour.

2. That the defendant, King Edward Tobacco Company of Flor-  
 ida, has not, during the period involved in this action, made, kept  
 and preserved records of hours worked each workday and each  
 workweek for each of its said employees as prescribed by the  
 Regulations, Part 516, Title 29, Chapter V, Code of Federal Reg-  
 ulations, Part 516, issued by the Administrator of the Wage and  
 Hour Division, United States Department of Labor; pursuant to  
 the authority vested in him by Section 11(c) of the Fair Labor  
 Standards Act of 1938 as amended (Title 29, U.S.C., 211 (c)).

3. That the defendant, King Edward Tobacco Company of  
 Florida, has, throughout the period involved in this action, regu-  
 larly and customarily shipped, delivered and sold or caused to be  
 shipped, delivered and sold, tobacco so handled by its employees  
 employed at rates of pay less than seventy-five (75) cents an



hour with knowledge that shipment, delivery and sale of said tobacco in interstate commerce was intended.

JETER S. RAY,

*Acting Solicitor,*

BEVERLEY R. WORRELL,

*Regional Attorney.*

82 H. GRADY KIRVEN,

*Attorney,*

*United States Department of Labor,*

*Attorneys for Plaintiff.*

MCCARTHY, LANE & ADAMS,

*Attorneys for Defendant.*

By EDW. MCCARTHY,

GARDNER AND LINES,

*Attorneys for Defendant.*

By RICHARD J. GARDNER.

In United States District Court

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—Filed August 3, 1953

Comes now the plaintiff by his attorney and hereby moves the Court to enter summary judgment for the plaintiff, in accordance with Rule 56 of the Federal Rules of Civil Procedure, on the ground that the pleadings, affidavits and all other documents and papers filed in this cause and all the proceedings heretofore had herein, together with the stipulation attached hereto, and hereby made a part hereof, show that there is no genuine issue as to  
83 any material fact and the plaintiff is entitled to judgment as a matter of law.

(S.) STUART ROTHMAN,

*Solicitor,*

(S.) BEVERLEY R. WORRELL,

*Regional Attorney.*

(S.) H. GRADY KIRVEN,

*Attorney,*

*United States Department of Labor,*

*Attorneys for Plaintiff.*

(Certificate of Service Omitted.)

## In United States District Court

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT—Filed August 8, 1953

Comes now the defendant King Edward Tobacco Company of Florida, a corporation, by its undersigned counsel, and moves the Court for Summary Judgment on the pleadings and affidavits, including the Affidavit of J. D. Vrieze herewith submitted and the affidavit of Waldo S. Carrell heretofore filed herein August 7, 1952; and for grounds of this motion, said defendant would show to the Court that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law denying the injunction and dismissing the plaintiff's complaint.

Dated this August 7, 1953.

(S.) EDW. MCCARTHY,

423 Atlantic National Bank Bldg.,  
Jacksonville, Florida.

(S.) RICHARD J. GARDNER,

Quincy, Florida.

(Certificate of Service Omitted.)

AFFIDAVIT OF J. D. VRIEZE—Filed August 8, 1953

STATE OF FLORIDA,

County of Gadsden:

J. D. VRIEZE, being first duly sworn, deposes and says:

I am a resident of the town of Quincy, Gadsden County, Florida, and am employed by King Edward Tobacco Company, a Florida corporation, in the capacity of General Manager.

I have been engaged in the business of planting, raising, curing, buying, selling, warehousing and packing cigar leaf tobacco for a period of 32 years.

The King Edward Tobacco Company of Florida, of which I am General Manager, is engaged in the business of planting, raising, harvesting, curing, warehousing and packing of cigar wrapper leaf tobacco in Gadsden County, Florida. Said corporation is now and has been at all times mentioned in the complaint and answer filed in this cause operating shade tobacco farms in Gadsden County, Florida, having a total acreage of not less than 3097 \* acres including cultivated land, uncultivated land, woodland and pasture. The total acreage of defendant's farm lands actually under cultivation is 732 \* acres, including 170 \* acres of "shade"

on which U. S. Type No. 62 Tobacco is grown under muslin cloth or cheesecloth. These figures, revised after submitting the "columnar chart".

U. S. Type No. 62 tobacco is used exclusively for cigar wrappers. It is grown only in Gadsden, Leon and Madison Counties, Florida, and in Decatur and Grady Counties, Georgia, and nowhere else in the world, unless in quantities that are inconsequential. The crop is grown in fields which are completely covered and enclosed with a cheesecloth shade. The cost per acre of production, and the price per acre which the farmer receives for his crop, are to my knowledge the highest of all agricultural crops produced in the United States, with the exception of other types of cigar wrapper tobacco grown in other sections of the country.

86 King Edward Tobacco Company owns and operates a warehouse in the town of Quincy, known as Warehouse No. 1, to which is brought and in which is bulked and packed shade-grown cigar wrapper leaf tobacco (Type No. 62) produced exclusively on said company's farms in Gadsden County, Florida, all within a radius of 14 miles, said Warehouse No. 1 in Quincy.

The handling of tobacco in defendant's said Warehouse No. 1 consists of receiving the tobacco from the curing barns on the farm and piling the tobacco leaf on the floor of the warehouse into piles or bulks, each containing between 3500 and 4500 pounds of tobacco; and during the period of approximately 2 to 4 months that such tobacco is so piled in bulks, the bulks are taken down from time to time and repiled or re-bulked; and in such re-bulking, the object is to take out the "hands" of tobacco from the middle of the bulk and place them on the outside, at the same time taking the "hands" that were on the outside of the bulk and placing them in the interior of the bulk. Such re-bulking is for the purpose of aerating the leaf and preventing an excess heating or fermentation in the interior of the bulk, and to assure that the natural changes in the leaf, which are hereinafter described, will be as uniform as possible in all the leaves throughout the entire bulk.

After such bulking of the tobacco leaf, as hereinabove described, or during the latter stages of such bulking, the hands of tobacco are aerated and sprayed for the purpose of keeping the leaf sufficiently moist to withstand handling.

87 When the bulking-sevting is completed and the temperature of the bulk ceases to rise, the bulk is taken down, and the tobacco leaves are sorted and graded by hand and re-bulked to dry out over a further period of from 2 to 4 months and are then baled in bundles or packages, unstemmed, for sale and shipment to the cigar manufacturer.

Except such employees as are engaged part time in maintenance work in and about the building, and such as are engaged in administrative and clerical office work, all defendant's employees in

said packing plant do not do any other work than that hereinabove described. None of the tobacco leaf handled in or shipped from said warehouse is stemmed, cut, treated or processed otherwise than as herein described.

Within the corporate limits of the town of Quincy there are also 12 other cigar leaf tobacco warehouses, to which warehouses are brought, bulked and packed shade-grown cigar wrapper leaf tobacco produced in Gadsden County, Florida, also Leon County, Florida, and Decatur and Grady Counties, Georgia.

All the shade-grown tobacco (Type 62) grown in Leon and Gadsden Counties, Florida, and in Decatur and Grady Counties, Georgia, is produced within a radius of 30 miles from the town of Quincy. The average annual production of shade-grown Type 62 in this area is approximately five million pounds. Of this average annual production an average of approximately three million pounds is brought to and warehoused in the town of Quincy.

88 The annual production of all agricultural products in Gadsden County, Florida, amounts to approximately \$12,000,000.00, including all crops, cattle and other farm products; and the average annual production of shade-grown cigar wrapper leaf tobacco in Gadsden County, Florida, is approximately \$9,000,000.00, 60 of which is brought to, bulked and packed in warehouses located in the town of Quincy. Gadsden County, Florida, is an agricultural County and the town of Quincy is a predominantly agricultural community, the majority of whose inhabitants gain their livelihood from and depend upon agriculture.

In harvesting this type of tobacco, as each leaf reaches a certain state of maturity on the stalk, it is picked or "primed", the lower leaves being first picked,—perhaps two or three from each stalk; and this "priming" is repeated from 4 to 7 times on up the stalk as the tobacco leaves mature. The leaves so picked are called "first primings" or "sand leaves", "second primings", "third primings", and so on. At each priming the leaves are immediately taken into the curing barn, strung and hung on sticks to dry. Although leaves of several different primings are hung in the same barn at the same time, as each priming completely loses its green color and becomes a shade of brown, it is taken down, packed loosely in boxes and carried to the warehouse where it is placed in bulks on the floor of the warehouse. The transference from the curing barns to the bulks must be prompt, in order to avoid any harmful stoppage or acceleration of the intra-cellular changes that are continuously taking place within the leaf.

89 The entire process of the treatment or care of the leaf, from the time it is first hung in the tobacco barn after priming until the time that the bulk sweating is completed, is one entire and continuous process of natural transformation within the leaf itself necessary to make the leaf in its raw and natural



state fit for the only use for which it is produced. Such care of wrapper tobacco, as distinguished from filler and binder types of tobacco, is as necessary, or more necessary, for the purpose of assuring the desired color and general appearance than for the purpose of affecting its flavor or aroma. This continuous natural internal transformation is completed without the addition, application or use of any external catalyst or other chemical or artificial stimulation or processing, other than to control and regulate temperature. Atmospheric temperature is controlled in the curing barn, and the temperature of the bulks is controlled in the warehouse by taking down and rebuilding the bulks from time to time as herein explained. Such temperature control is necessary to prevent either an injurious acceleration or an injurious stoppage of the natural internal transformation of the leaf, which is a gradual and continuous process of drying and oxidation, accompanied by intra-cellular activities of micro-organisms and of the internal organic chemicals within the leaf.

The changes in the tobacco leaf which occur after the leaf is taken from the barn and put into the warehouse are such as could be allowed to continue, and would continue, if the leaf were left in the curing barn, if the barn had proper temperature and atmospheric control. There are not enough curing barns on the farm to accommodate or store all the tobacco that would  
 90 have to be accumulated and stored during the entire period of time from the first harvesting or priming until the time that the bulk sweating is completed and the tobacco ready for grading and packing. Moreover, the natural processes which continue through the period of bulk sweating in the warehouse would be too slow and would take too long if the tobacco leaf were left hanging in the curing barn on the farm; and such natural processes would not have a uniform result on all the tobacco leaves unless the temperature of bulks were watched and controlled by taking down and re-bulking.

When the green leaf is primed on the farm and first hung in the curing barn its water content is 80% to 85%, and the initial stages of curing the leaf in the barn consist primarily of a natural and gradual drying of the leaf and the evaporation of the large excess of water, which must be at such a rate and under such conditions as will not injuriously interfere with the accompanying intra-cellular chemical transformations that take place contemporaneous, and continuously throughout the entire curing and bulk sweating process. The most obvious change which occurs in the leaf while undergoing barn curing is (1) the loss of water, which is reduced from 80% to 85% content to a moisture content of between 10% and 25%, and (2) the loss of its green color and a coloring of the leaf; but irrespective of the moment when the leaf

is removed from the curing barn into the warehouse it is impossible to say that what moment of time, or that at any particular moment of time, those intra-cellular changes which are predominant during the barn-curing period cease and those intra-cellular changes which are predominant during the period of bulk sweating begin. In other words, the intra-cellular transformation which is predominant during the period of barn curing on the farm continues to take place after the leaf is moved into the warehouse and the bulk sweating is begun; likewise, those intra-cellular transformations which are predominant during the period of bulk sweating actually have their incipency while the leaf is still hanging in the curing barn on the farm.

Thus, for instance, the loss of moisture which is more rapid during the period of barn-curing on the farm continues throughout the period of bulk sweating in the warehouse, although at a slower rate. And the coloring of the leaf which commences in the curing barn also continues during the period of bulk sweating, the leaf becoming a deeper green, red or brown. The most notable chemical changes in the consistency of the leaf are a decrease in malic acid and nicotine content, which is continuous throughout the period of barn-curing and the period of bulk sweating; also a rise in the citric acid content during the period of barn-curing followed by a reduction of the citric acid content during the period of bulk sweating. This latter change, first in the accumulation and then in the loss of citric acid, is not a sudden change, but gradual, and is believed to be due, not to the fact that the leaf is taken out of the curing barn and put into bulks in the warehouse, but to the effect of other accompanying internal chemical changes and activities of intra-cellular micro-organisms.

During the period of bulk sweating the leaf undergoes a most noticeable fermentation caused by the activities of intra-cellular micro-organisms. Although most pronounced during the period of bulk sweating fermentation actually begins during the time that the leaf is still hanging in the curing barn on the farm. The process of bulk sweating is not for the purpose of causing such fermentation, but for the purpose of controlling and regulating it so as not to injure the leaf or destroy its flavor, aroma, burning qualities or its important color and general appearance, and so as to assure that all the leaves in an entire bulk will be affected uniformly and not haphazardly.

After the bulking process in the warehouse is completed, and before the leaf is graded and baled, the leaf is remoistened, being sprayed with a fine spray. This remoistening, or "kasing", as it is called, is not for the purpose of stimulating or affecting the process of fermentation, but is for the purpose of keeping the leaf

soft and pliable enough to withstand necessary handling without breakage or injury.

J. D. VRIEZE

Sworn to and subscribed before me this 7th day of August, 1943.

ALICE B. MITCHELL,

*Notary Public*

(Notarial Seal)

My Commission expires: May 9, 1955.

93

In United States District Court

PLAINTIFF'S MOTION TO STRIKE PORTIONS OF AFFIDAVIT FILED  
IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT  
Filed on August 17, 1953.

Plaintiff, Martin P. Durkin, Secretary of Labor, United States Department of Labor, moves the Court to strike the following portions of the affidavit of J. D. Vrieze attached to defendant's motion for summary judgment filed heretofore in this cause for the reasons hereinafter assigned.

1. That portion commencing at the bottom of the first page of said affidavit which reads as follows: "It is grown only in Gadsden, Leon and Madison Counties, Florida, and in DeCATUR and Grady Counties, Georgia, and nowhere else in the world, unless in quantities that are inconsequential". The grounds for striking said portion are (a) that the affidavit does not establish that affiant has personal knowledge of these matters, (b) that such statement represents a conclusion of facts, and (c) that the matter is hearsay evidence and therefore inadmissible.

2. That portion commencing at line 3 on the second page of said affidavit which reads as follows: "The cost per acre of production, and the price per acre which the farmer receives for his crop, are to my knowledge the highest of all agricultural crops produced in the United States, with the exception of other

94. types of wrapper tobacco grown in other sections of the country". The grounds for striking said portion are (a) that the affidavit does not establish that affiant has personal knowledge of the matters therein set forth, (b) that such matters represent conclusions of fact and not facts themselves, (c) that affiant's statements of these matters do not constitute the best evidence of the matters set forth therein and purporting to be facts, and (d) is not material to any issue in this case and is therefore inadmissible.



3. That portion commencing at line 9 on the fourth page of said affidavit which reads as follows: "The annual production of all agricultural products in Gadsden County, Florida, amounts to approximately \$12,000,000.00 including all crops, cattle and other farm products". The grounds for striking said portion are (a) that it is not set forth or established in the affidavit that affiant has personal knowledge of such matters, (b) that said affidavit does not establish that affiant is competent to testify to such matters, (c) that affiant's statements of these matters do not constitute the best evidence of the matters set forth therein, and (d) that such matters are immaterial and irrelevant to the cause at issue and therefore would be inadmissible in evidence.

4. That portion commencing at line 16 of the fourth page of the said affidavit which reads as follows: "Gadsden County, Florida, is an agricultural County and the town of Quincy is a predominantly agricultural community, the majority of whose inhabitants gain their livelihood from and depend upon agriculture".

95 The grounds for striking said portions are (a) that the affidavit does not set forth or establish that affiant has personal knowledge of said matters, (b) that nowhere in the affidavit has affiant been qualified as competent to testify as to such matters, (c) that such matters are clearly conclusions of fact, opinion and belief and as such do not meet the requirement of Rule 56 (e) that an affidavit shall and must set forth facts only, and (d) that affiant's statements do not constitute the best evidence of the matters set out therein and therefore would be inadmissible in evidence.

5. All the matters contained in that portion of said affidavit commencing at line 11 of the fifth page and continuing through the fifth, sixth and seventh, eighth and ninth pages of said affidavit which pertain in any manner whatsoever to any and all internal changes in the tobacco leaf during its growth or subsequent handling, processing, curing or bulking. The grounds for striking said portions are (a) that the affidavit nowhere establishes that affiant has personal knowledge of such matters set forth therein, (b) that these matters by their own terms establish that they relate to internal chemical changes in the tobacco leaf and it is obvious that affiant has not been qualified as an expert so as to be competent to testify to these chemical changes, (c) that whether the leaf is in its raw or natural state is a conclusion of fact and law to be resolved from competent testimony concerning the chemical and other changes occurring in the leaf during the growing, curing, bulking and other processing activities, and (d) that the statements by affiant contained in his affidavit would not be

96 admissible in evidence and therefore do not comply with the mandatory requirements of Rule 56. (e).



Wherefore, plaintiff prays this Court for an order striking the portions of the affidavit as set forth hereinabove.

Dated: August 14th 1953.

STUART ROTHMAN,

*Solicitor,*

BEVERLEY R. WORRELL,

*Regional Attorney,*

H. GRADY KIRVEN,

*Attorney, United States Department of Labor, Attorneys for Plaintiff.*

Post office address:

Office of Solicitor,

U. S. Department of Labor,

1908 Comer Building,

Birmingham 3, Alabama.

Certificate of Service (omitted in printing)

97 In United States District Court, in and for the Northern District of Florida, Tallahassee Division

Case No. 305-T-Civ.

MARTIN P. DRUKIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF,

VS.

JOSEPH T. BUDD, JR. AND FLORENCE W. BUDD, CO-PARTNERS, DOING BUSINESS AS J. F. BUDD, JR. AND COMPANY, DEFENDANTS

Case No. 340-T-Civ.

MARTIN P. DRUKIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF,

VS.

KING EDWARD TOBACCO COMPANY OF FLORIDA, A FLORIDA CORPORATION, DEFENDANT

MEMORANDUM DECISION - Filed September 20, 1953

98 U. S. Type 62 Sumatra tobacco is a leaf tobacco grown and used extensively for cigar wrappers and grown exclusively in two areas, in Florida and one small area in Georgia. The principle area where this tobacco is grown is in Gadsden and Leon counties, Florida and in Decatur and Grady counties, Georgia.

contiguous to the Florida counties named above. All this type of tobacco grown in these counties is grown within an airline radius of thirty miles of the town of Quincy in Gadsden County, Florida and is processed and packed in packing houses located chiefly in and around Quincy. In the Quincy area of production there are 300 farmers growing this type of tobacco of which 80% grow and harvest less than 25 acres per year. A small amount of this type of tobacco is also grown in Madison County, Florida.

### History of Litigation

Plaintiff originally brought suit against Joseph T. Budd, Jr. and Florence W. Budd, co-partners, doing business as J. T. Budd, Jr. and Company, to enjoin this company from violation of the Fair Labor Standards Act (29 USCA, Sec. 201 et seq.). This suit was instituted on February 10, 1951. The facts in the case, as disclosed by the pleadings and supporting evidence filed in the case, show that the Budd Company grows no Type 62 tobacco, but operates a packing house where it processes the tobacco grown by many small farmers.

At a pre-trial conference held in February, 1952, after the case was at issue, it developed that of the 11 remaining packing houses in the Quincy area processing Type 62 tobacco for shipment and sale, and who had not complied with the Fair Labor Standards Act, 6 processed, in addition to tobacco grown by themselves, tobacco grown by others, and the remaining 5 processed tobacco grown by themselves alone.

It was obvious to the Court, at the conclusion of the pre-trial conference, that the Budd Company operation was in violation of the Fair Labor Standards Act. A decision to that effect in that case would have adversely affected the 6 other operators not in compliance with the Act, who process and pack tobacco grown by small farmers. It also appeared to the Court at that time that any decision in the Budd case would not immediately affect the packing house operators who process their own tobacco exclusively. The overall result would have been disastrous to the small growers of Type 62 tobacco. Therefore, the Court insisted that before decision in the Budd case, the Administrator bring suit against an operator processing tobacco grown exclusively by it, so that the Court could determine whether the Act was applicable to their packing house operations as well. The Administrator, accordingly brought suit against the King Edward Tobacco Company of Florida. This suit was filed on March 23, 1952. The May Tobacco Company intervened and is a party defendant in this suit.

The nature of the alleged violations in the King Edward Tobacco Company case are the same as those alleged in the Budd

case. When this case became at issue on the pleadings and supporting evidence introduced by the parties, defendant, King Edward Tobacco Company, filed a motion for summary judgment, contending that the essential facts were not in dispute and that on the undisputed facts defendant is exempt from the Fair Labor Standards Act, under Clauses (6) and (10) of Section 213(a) of the Act. Because of collateral factual issues raised by plaintiff in this case, which the plaintiff was unwilling to waive at that time, the Court was compelled to and did, deny defendant's motion for summary judgment.

At a pre-trial conference held in this case and in the Budd case, on a later date, the Court announced to the respective parties that, in its opinion the essential facts in each of these cases are not in dispute and that upon each party plaintiff and defendant waiving the unessential questions raised in their pleadings and supporting evidence by filing motions for summary judgment the Court would pass upon these motions and determine whether the operations of these defendants at their packing houses are subject to the Fair Labor Standards Act.

Due, however, to the effect such a decision would have upon these defendants, should the decision go adversely to them, by leaving all their competitors free from compliance with the Act until their cases were adjudicated, the Court further suggested, and the Administrator acquiesced in the proposal of the Court, that suits be brought against every packing house operator in the Quincy area not in compliance with the Act and that these cases be brought to issue in the same way as the cases then before the Court. This has been done. There are 15 packing houses operating in this area. Similar suits are now pending against the operators of 12 of these packing houses, which are at issue. The essential facts in each case are not in dispute and the sole question before the Court is whether packing house employees are exempt under Clauses (6) and (10) of Section 213(a) of the Act.

101. The Court is now in position to render judgment in all these cases that will be applicable to all of them alike at the same time and no injustice will be done anyone, however the cases may go. The remaining 3 packing houses have complied with the provisions of the Act.

#### Method of Growing, Harvesting and Marketing Type 62 Shade Leaf Tobacco

Type 62 shade leaf tobacco requires special and painstaking cultivation, harvesting, curing and preparation for market. It grows in fields inclosed in a cheesecloth shade, which completely covers and incloses the tobacco field. The cheesecloth is supported by wires strung on posts placed at regular intervals through the

field. It is highly fertilized and intensively cultivated during the growing period. When each leaf reaches a certain stage of maturity it is promptly harvested. This harvesting is known as "priming". The lower leaves are picked first, perhaps not more than two or three from stalk. This picking is repeated as the tobacco matures on up the stalk until the marketable leaves have been removed. At each priming the tobacco is immediately taken to a tobacco barn located on the farm where it is strung on sticks and dried by means of heat. When the tobacco is almost completely dried the drying process is interrupted and it is permitted to absorb moisture and again dried. This drying process is repeated until the tobacco has reached a stage in the process of curing when it is ready for the packing house.

It is then taken from the barns in the field, placed in appropriate containers and carried to the packing house where 102 it is placed in piles known as "bulks" for curing. Each bulk consists of more than 3000 lbs. of tobacco. The packing houses are equipped with machinery for the appropriate humidification and curing of the tobacco. During the curing period the temperature within each bulk is closely watched from day to day and at regular intervals, when the appropriate time has arrived, the bulk is broken up the tobacco leaves shaken out and those on the outside placed on the inside of the new bulk and those on the inside placed on the outside for further curing. This process is continued until the tobacco is ready for market when it is baled for shipment.

In the Quincy area, for the year 1950, approximately 2554 acres were planted to Type 62 shade leaf tobacco. Of this total acreage 1459 acres were grown by companies operating packing houses that handled no tobacco save that produced by them. Small producers owning no packing houses but depending on others for the preparation of their tobacco for market grew 784 acres and the packing houses that processed this tobacco also grew and processed for their own account 311 acres.

### The Budd Case

The Budd Company grows no tobacco for its own account, but processes and prepares for market in its packing house tobacco grown by others. For the year 1950 this company processed the tobacco grown by 52 small farmers on 263 acres. The Budd Company entered into a contract with each of these farmers under which each farmer theoretically took over the packing house with all its equipment and the employees (approximately 103 of the Budd Company for the processing of his own tobacco and sold the tobacco, when processed, to the



Budd Company. A system of bookkeeping was set up by which each farmer paid to the Budd Company the actual cost of the processing of the tobacco grown by him, and the Budd Company paid the employees. During the year 1950, 333,889 lbs. of tobacco of these 52 farmers was processed in the Budd Company's packing house.

It was all purchased by the Budd Company. The Budd Company sold 231,209 lbs. of this tobacco to the Budd Cigar Company, a corporation of Quincy, Florida. The remainder of the tobacco was sold to other persons, firms or corporations, much of which went into interstate commerce.

Little need be said as to the plan adopted by the Budd Company to circumvent the Fair Labor Standards Act. The arrangement was conceived and put into effect solely for this purpose. This law may not be circumvented in this manner and the plan adopted did not accomplish the result desired. The Budd Company operations are clearly subject to the provisions of the Fair Labor Standards Act, with reference to the compensation of all employees working on the tobacco or in connection therewith in the Budd packing house. *Earns Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755; *McComb v. Super-A Fertilizer Works, Inc.*, 165 Fed. 2nd, 824.

#### The King Edward Tobacco Company Case.

In the King Edward Tobacco Company case the facts are entirely different from those in the Budd case. During 104 the year 1950 the King Edward Tobacco Company cultivated 206 acres of Type 62 shade leaf tobacco. The process of growing, harvesting and drying this tobacco in the barns on the farms where the tobacco was grown and in bulk-ing, curing and preparing the tobacco for market in the packing house was the same as that generally outlined heretofore.

When the tobacco reached the stage in the process of curing, when it was ready for the packing house, the King Edward Tobacco Company took it to one of its packing houses where no other tobacco was processed and made ready for market.

The King Edward Tobacco Company operated two other packing houses where tobacco grown by others is processed and made ready for market and defendant concedes that these packing house operations are subject to the Act, but as it uses the packing house involved in this suit to process tobacco grown only by it, it claims exemption for this operation from the provision of the Act. The tobacco processed by the defendant in this packing house is sold chiefly to an affiliate of the defendant.

The packing house in question is located within the corporate limits of Quincy, Florida, and is not located on any of the farms operated by defendant. In this case the issue is whether the

packing house employees are entitled to the benefits of the Fair Labor Standards Act or whether defendant's operations are exempt therefrom under Clauses (6) and (10) of Section 213(a) of the Act.

105 Plaintiff concedes that all labor employed in the growing, harvesting and handling of the tobacco up to the time it reaches the platform of the packing house is exempt, but as soon as this tobacco is delivered to the packing house, all employees engaged in the handling of it thereafter or who work in any other capacity in connection with its handling, are subject to the Act. Defendant's position is that the farming operation in connection with the handling of this tobacco does not cease until the tobacco is prepared for market and made ready for shipment, which would exclude every employee in the packing house working hereon or in connection therewith.

This question has been before the Court in numerous cases and there is some conflict among the decisions as to where the farming exemptions end and the Wages and Hours provisions of the Fair Labor Standards Act applies. *See, Fleming v. Farmers' Peanut Co.*, 15th Cir., 128 Fed. 2nd, 404 and *Puerto Rico Tobacco Marketing Cooperative Ass'n. v. McComb*, 1st Cir., 181 Fed. 2nd, 697. On the same day the Court of Appeals, 5th Circuit, decided *Fleming v. Farmers' Peanut Company*, supra, it also decided *Fleming v. Jacksonville Paper Company, et al.*, 128 Fed. 2nd, 395. While the Court of Appeals reversed the Jacksonville Paper Company case the reversal was on very narrow grounds, as disclosed by the opinion in that case. The Administrator carried the Jacksonville Paper Company case to the United States Supreme Court—see *Walling, Adm' v. Jacksonville Paper Co.*, 317 U.S. 564. The Supreme Court affirmed the judgment of the Court of Appeals, 5th Circuit, reversing the District Court in that case, but in so doing held the Court of Appeals adopted "too narrow a construction of the 106: Act" in its Opinion in that case.

In all cases it is not easy to draw the line, but based upon the reasoning in the later cases it is not difficult to draw the line in this case. This Court finds and holds that upon the record in this case the farming exemption ends when the tobacco reaches the receiving platform of the packing house for processing and packing purposes for use or sale in the market. The Court considers it unnecessary to labor this point as this question has been sufficiently considered and expounded in the cases relied upon by this Court to sustain its findings and holdings herein. *Walling, Adm' v. Jacksonville Paper Co.*, 317 U.S. 564; *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755; *Wailana Agr. Co. v. Managa*, 97 Fed. Supp., 198; *Calaf v. Gonzaless*, 127 Fed. 2nd, 934; *Vines, et al., v. Serralles*, 145 Fed. 2nd, 552 and *Walling, Adm' v. Connecticut*

Co., 154 Fed. 2nd 552. Having found and held that the farming exemption ends when the tobacco reaches the receiving platforms of the packing house, it is unnecessary to consider the relative scope and effect of Clauses (6) and (10) of Section 213(a) of the Act in this case.

#### May Tobacco Company Case.

The May Tobacco Company case is in every respect similar to that of the King Edward Tobacco Company case. The May Tobacco Company grew 90 acres of Type 62 shade leaf tobacco in 1950 and processed in its packing house tobacco grown exclusively by it. For the reasons stated above the reference to the application of the Fair Labor Standards Act to the King Edward Tobacco Company the Court finds and holds that the packing house operations of the May Tobacco Company are also subject to the provisions of the Act.

An appropriate judgment will be entered in the Budd Case, the King Edward Case and the May case in conformity with this Memorandum Decision.

What the Court has held in the Budd case, the King Edward Case and the May Case is equally applicable to each of the other cases pending before the Court and upon plaintiff filing a motion for summary judgment in each case a short memorandum decision, referring to the decision in these cases, will be filed in those cases and a final judgment entered in each case accordingly.

Dated at Tallahassee, Florida, this 29th day of September, 1953.

U. S. DOZIER A. DEVANE,  
*United States District Judge*

In United States District Court

DEFENDANT'S MOTION TO REVISE STATEMENT OF FACTS CONTAINED IN  
MEMORANDUM DECISION, Filed November 14, 1953

Comes now the defendant King Edward Tobacco Company of Florida and moves the Court to revise the Statement of Facts contained in Memorandum Decision dated herein September 29, 1953, in the following particulars:

1. On Page 1 delete the sentence, "This drying process is repeated until the tobacco has reached a stage in the process of curing when it is ready for the packing house;" and substitute in lieu thereof,—"This drying process is continued until the tobacco is

moved from the barn to a packing plant", or words to the same general effect.

2. On page 6 delete the sentence, "When the tobacco reached the stage in the process of curing, when it was ready for the packing house, the King Edward Tobacco Company took it to one of its packing houses where no other tobacco was processed and made ready for market", and substitute in lieu thereof, — "When the tobacco is moved from the barn it is taken to one of the packing plants of King Edward Tobacco Company in which the tobacco of no other grower is handled", or words to the same general effect.

And as grounds of this motion the defendant would show that it does not appear from the affidavits or other evidence that tobacco "reaches a stage" or that it has to reach any particular "stage" at which it is moved from the barn to the packing plant.

## II

And Defendant further moves the Court to delete the words "The packing houses are equipped with machinery for the appropriate humidification and curing of the tobacco", appearing at the bottom of page 4 and top of page 5; upon the ground that there is no evidence or showing that such packing plants are equipped with machinery.

## III

And defendant further moves the Court to delete the words appearing near the bottom of page 6, "and defendant concedes that these packing house operations are subject to the Act"; upon the ground that the affidavits or evidence herein do not now show that the defendant "concedes" or admits that such operations "are subject to the Act", but such evidence shows, at most, that the defendant is not in violation of the Act at such other packing houses.

## IV

And defendant further moves the Court to add to the paragraph ending near the middle of page 5, in the paragraph ending near the middle of page 5, immediately preceding the heading "The Budd Case" the following sentence: "A majority of the employees who work on tobacco in the packing plant also work part of the time on the tobacco farms."

## V

And defendant further moves the Court to receive and consider the additional affidavit of Robert F. Gardner tendered herewith and to modify the memorandum decision by incorporating therein a finding based upon such additional affidavit. And for grounds of



110 this motion defendant would show the Court that such additional fact is not "new" or an afterthought, but was previously disclosed to the Court in the defendant's "columnar chart" copies of which were delivered to the Court and plaintiff's counsel at the oral argument and pre-trial conference June 30, 1953.

HOW McCAHILL

423 Atlantic National Bank Bldg.  
Jacksonville, Florida

RICHARD J. GARDNER  
*Attorneys for Defendant*

Quincy, Florida

Affidavit of ROBERT F. GARDNER. Filed November 14, 1953.

STATE OF FLORIDA,

County of Gadsden:

Robert F. Gardner, being first duly sworn, deposes and says: I am a resident of the Town of Quincy, Gadsden County, Florida, and I am employed in a supervisory capacity by The King Edward Tobacco Company of Florida, a Florida corporation.

That on 21 October, 1953, which is the height of the packing season of the Type 62 cigar leaf wrapper tobacco, a survey was made of the employees of The King Edward Tobacco Company of Florida present on that date in and about its tobacco packing plant known as packing house #1, located at Quincy, Florida; such employees then being engaged in the bulking, sorting, handling and baling of the said tobacco.

111 The survey revealed that 83 of the 93 employees present had either worked continuously with this tobacco or with other Type 62 tobacco from the time of the planting until the date of the survey including participation in the growing and harvesting and the barn curing of such tobacco.

ROBERT F. GARDNER

Sworn to and subscribed before me this 13th day of November, 1953.

ALICE B. MITCHELL

(Seal)

*Notary Public, State of Florida at Large*

My commission expires May 9, 1955.

## In United States District Court

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST INTERVENER  
MAY TOBACCO COMPANY - Filed November 30, 1953

Comes now the plaintiff by his attorneys and hereby moves the Court to enter judgment for the plaintiff against May Tobacco Company, intervenor, in accordance with Rule 56 of the Federal Rules of Civil Procedure, on the ground that the pleadings, affidavits and all other documents and papers filed in this cause and all the proceedings heretofore had herein, together with the stipulation attached hereto, and hereby made a part hereof, show that there is no genuine issue as to any material fact and the plaintiff is entitled to judgment as a matter of law.

(S.) STUART ROTHMAN,

*Solicitor.*

(S.) BEVERLEY R. WORRELL,

*Regional Attorney.*

(S.) H. GRADY KIRVEN,

*Attorney, United States Department of Labor.**Attorneys for Plaintiff.*

(Certificate of Service omitted.)

## In United States District Court

## STIPULATION OF FACTS - Filed November 30, 1953

Comes now the plaintiff and the intervenor by their respective attorneys and for purposes of this action stipulate and agree as follows:

1. That during the period of time involved in this action the intervenor, May Tobacco Company, did employ, and is employing many of its employees engaged in the handling of tobacco in and about its place of business located at Quincy, Florida, at wage rate less than seventy-five (75) cents an hour.

2. That the intervenor, May Tobacco Company, has not, during the period involved in this action, made, kept and preserved records of hours worked each workday and each workweek for each of its said employees as prescribed by the Regulations, Part 516, Title 29, Chapter V, Code of Federal Regulations, Part 516 issued by the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority

vested in him by Section 41(c) of the Fair Labor Standards Act of 1938 as amended (Title 29, U.S.C., 211(c)).

3. That the intervenor, May Tobacco Company, has, throughout the period involved in this action, regularly and customarily shipped, delivered and sold, tobacco so handled by its employees employed at rates of pay less than seventy-five (75) cents an hour with knowledge that shipment, delivery and sale of said tobacco in interstate commerce was intended.

(S.) STUART ROTHMAN,

*Solicitor.*

(S.) BEVERLEY R. WORRELL,

*Regional Attorney.*

(S.) H. GRADY KIRVEN,

*Attorney, United States Department of Labor.*

*Attorneys for Plaintiff.*

MESSER & WILLIS,

*Attorneys for Intervener.*

By (S.) BEN C. WILLIS.

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In United States District Court

ORDER FOR SUBSTITUTION OF PARTY PLAINTIFF—Filed November 30,  
1953

It having been satisfactorily shown to this Court that James P. Mitchell is the duly appointed and qualified Secretary of Labor, United States Department of Labor, and that as such Secretary of Labor, United States Department of Labor, he has succeeded to all of the rights, duties and prerogatives of Martin P. Durkin, heretofore appearing as the Secretary of Labor, United States Department of Labor, and the plaintiff in this cause, and it appearing that there is substantial need for continuing and maintaining the above-entitled action, it is, therefore, on motion of attorneys for plaintiff,

Ordered, Adjudged and Decreed that the said James P. Mitchell, Secretary of Labor, United States Department of Labor, be, and he hereby is, substituted as plaintiff herein in the place and stead of Martin P. Durkin, formerly Secretary of Labor, United States Department of Labor, without prejudice to the proceedings already had in this action, and that this cause may be continued and maintained by said James P. Mitchell, Secretary of Labor, United States Department of Labor.

Dated: November 30th, 1953.

DOZIER A. DEANE,

*United States District Judge.*

115 Plaintiff moves for entry of the above order.

STUART ROTHMAN,  
*Solicitor.*

BEVERLEY R. WORRELL,  
*Regional Attorney.*

H. GRADY KIRVEN,  
*Attorney, United States Department of Labor.*  
*Attorneys for Plaintiff.*

Defendant consents to entry of the above order:

EDWARD MCCARTHY;  
RICHARD J. GARDNER,  
*Attorneys for Defendant.*

*King Edward Tobacco Company of Florida*

MESSNER & WILLIS,

By BEN C. WILLIS,  
*Attorneys for Intervener.*

116 In United States District Court

MOTION OF INTERVENER, MAY TOBACCO COMPANY, FOR SUMMARY  
JUDGMENT—December 8, 1953

Comes now the intervener May Tobacco Company, a corporation, by its attorneys and hereby moves the Court to enter summary judgment on the pleadings and affidavit, including the affidavit of Fred L. May, herewith submitted and attached hereto, and for grounds of this motion the said intervener would show to the Court that there is no genuine issue as to any material fact and that the intervener is entitled to judgment as a matter of law.

Dated this 8th day of December, 1953.

MESSNER & WILLIS,  
By BEN C. WILLIS,  
*Attorneys for the Intervener.*

403-5 Midyette-Moor Building,

Tallahassee, Florida.

I certify that two copies of the foregoing motion together with two copies of the Fred L. May affidavit therein mentioned were mailed this day to Beverley R. Worrell, Esquire, Regional Attorney, Department of Labor, 1908 Comer Building, Birmingham 3, Alabama.

117 Dated this 8th day of December, 1953.

BEN C. WILLIS,  
*Defendant's Attorney.*



## AFFIDAVIT OF FRED L. MAY

STATE OF FLORIDA,

County of Gadsden:

Fred L. May, being first duly sworn, deposes and says:

I am a resident of the town of Quincy, Gadsden County, Florida, and am president of the May Tobacco Company, a Florida corporation, and actively engaged in its management. I have been engaged in the business of planting, raising, curing, warehousing, packing and selling cigar wrapper leaf tobacco for a period of 40 years.

The May Tobacco Company, a corporation of which I am president, is engaged in the business of planting, raising, harvesting, curing, warehousing and packing cigar wrapper leaf tobacco in Gadsden County, Florida. Now and at all times mentioned in the complaint and answer filed in this cause the said corporation has been continuously and actively engaged in farming operations and actively planting, cultivating, growing and harvesting tobacco on the farms of this corporation in Gadsden County, Florida. The acreage of the said corporation's farms include about 2800 acres in the aggregate, including woodland, grazing land, and general farm land, and including an average of between 80 and 100 acres of cultivated tobacco under shade on which U. S. Type No. 62 tobacco is grown under mouslin cloth or cheesecloth.

118 U. S. Type No. 62 tobacco is used exclusively for cigar wrappers. It is grown only in Gadsden, Leon and Madison Counties, Florida, and in Decatur and Grady Counties, Georgia, and nowhere else in the world, unless in quantities that are inconsequential. The crop is grown in fields which are completely covered and enclosed with a chee-cloth shade. The cost per acre of production, and the price per acre which the farmer receives for his crop are to my knowledge the highest of all agricultural crops produced in the United States, with the exception of other types of cigar wrapper tobacco grown in other sections of the country.

The May Tobacco Company referred to hereinafter as "the defendant", owns and operates a tobacco packing plant which is located at 404 East Washington Street in the City of Quincy, Florida, which is located within a distance of not exceeding ten miles from the defendant's farms on which U. S. Type No. 62 tobacco is grown. To this packing plant is brought the shade grown cigar wrapper leaf tobacco (Type No. 62) produced on said corporation's farms in Gadsden County, Florida. No other tobacco except that produced on the defendant's farms is received at said packing plant; and it is only the defendant's own tobacco which is bulked and packed at said packing plant.

The handling of tobacco in the defendant's packing plant consists of receiving the tobacco from the curing barns on the farm and pil-

ing the tobacco leaf on the floor of the packing plant into piles or bulks, each containing between 3500 and 4500 pounds of tobacco, and during the period of approximately 2 to 4 months that such tobacco is so piled in bulks, the bulks are taken down from time to time, and re-piled or re-bulked, and in such re-bulking, the object is to take out the "hands" of tobacco from the middle of the bulk and place them on the outside, at the same time taking the "hands" that were on the outside of the bulk and placing them in the interior of the bulk. Such re-bulking is for the purpose of aerating the leaf and preventing an excess heating or fermentation in the interior of the bulk, and to assure that the natural changes in the leaf, which are hereinafter described, will be as uniform as possible in all the leaves throughout the entire bulk.

After such bulking of the tobacco leaf, as hereinabove described, or during the latter stages of such bulking, the hands of tobacco are aerated and sprayed for the purpose of keeping the leaf sufficiently moist to withstand handling.

When the bulk-sweating is completed and the temperature of the bulk ceases to rise, the bulk is taken down, and the tobacco leaves are sorted and graded by hand and re-bulked to dry out over a further period of from 2 to 4 months and are then baled in bundles or packages, unstemmed, for sale and shipment to the cigar manufacturer.

Except such employees of the corporation as are engaged part time in maintenance work in and about the building, and such as are engaged in administrative and clerical office work, all of the defendant's employees in said packing plant do not do any other work than as hereinabove described while working in said packing plant. At the height of the packing season, the corporation employs approximately 70 persons in and about its packing plant and approximately 90% of these employees live outside of the corporate limits of the City of Quincy and reside either on the farms of the May Tobacco Company located in Gadsden County, Florida, or on adjoining and nearby farm lands. These same employees work continuously with this tobacco from the time of planting, during the growing, harvesting and barn curing and in the packing plant where the curing of the tobacco continues until it is baled and ready for the market. During the season that said employees are engaged in work at said packing plant, it is the practice and custom of the May Tobacco Company to furnish transportation and to transport said employees by automobile truck from their homes on the farms aforesaid into the City of Quincy to work in said defendant's packing plant.

None of the tobacco leaf handled in or shipped from said packing plant is stemmed, cut, treated or processed otherwise than as herein described.

In harvesting this type of tobacco, as each leaf reaches a certain state of maturity on the stalk, it is picked or "primed", the lower leaves being first picked,—perhaps two or three from each stalk, and this "priming" is repeated from 4 to 7 times on up the stalk as the tobacco leaves mature. The leaves so picked are called "first primings" or "sand leaves", "second primings", "third primings", and so on. At each priming the leaves are immediately taken into the curing barn located on the farm, strung and hung on sticks to dry. Although leaves of several different primings are hung 121 in the same barn at the same time, as each priming completely loses its green color and becomes a shade of brown, it is taken down, packed loosely in boxes and carried to the packing plant where it is placed in bulks on the floor of the packing plant. The transference from the curing barns to the bulks must be prompt, in order to avoid any harmful stoppage or acceleration of the intracellular changes that are continuously taking place within the leaf.

The entire process of the treatment or care of the leaf, from the time it is first hung in the tobacco barn after priming until the time that the bulk sweating is completed, is one entire and continuous process of natural transformation within the leaf itself necessary to make the leaf in its raw and natural state fit for the only use for which it is produced. Such care of wrapper tobacco, as distinguished from filler and binder types of tobacco, is as necessary, or more necessary, for the purpose of assuring the desired color and general appearance than for the purpose of affecting its flavor or aroma. This continuous natural internal transformation is completed without the addition, application or use of any external catalyst or other chemical or artificial stimulation or processing, other than to control and regulate temperature. Atmospheric temperature is controlled in the curing barn, and the temperature of the bulks is controlled in the packing plant by taking down and rebuilding the bulks from time to time as herein explained. Such temperature control is necessary to prevent either an injurious acceleration or an injurious stoppage of the natural internal transformation of the leaf, which is a gradual and continuous process 122 of drying and oxidation, accompanied by intra-cellular activities of micro-organisms and of the internal organic chemicals within the leaf.

The changes in the tobacco leaf which occur after the leaf is taken from the barn and put into the packing plant are such as could be allowed to continue and would continue, if the leaf were left in the curing barn, if the barn had proper temperature and atmospheric control. There are not enough curing barns on the farm to accommodate or store all the tobacco that would have to be accumulated and stored during the entire period of time from the first harvesting or priming until the time that the bulk sweating is



completed and the tobacco ready for grading and packing. Moreover, the natural processes which continue through the period of bulk sweating in the packing plant would be too slow and would take too long if the tobacco leaf were left hanging in the curing barn on the farm; and such natural processes would not have a uniform result on all the tobacco leaves unless the temperature of bulks were watched and controlled by taking down and re-bulking.

When the green leaf is primed on the farm and first hung in the curing barn its water content is 80% to 85%, and the initial stages of curing the leaf in the barn consist primarily of a natural and gradual drying of the leaf and the evaporation of the large excess of water which must be at such a rate and under such conditions as will not injuriously interfere with the accompanying intra-cellular chemical transformations that take place contemporaneously and continuously throughout the entire curing and bulk sweating process. The most obvious change which occurs in the leaf while undergoing barn curing is (1) the loss of water, which is reduced from 80% to 85% content to a moisture content of between 10% and 25%, and (2) the loss of its green color and a coloring of the leaf; but irrespective of the moment when the leaf is removed from the curing barn into the packing plant it is impossible to say that what moment of time, or that at any particular moment of time, those intra-cellular changes which are predominant during the barn-curing period cease and those intra-cellular changes which are predominant during the period of bulk sweating begin. In other words, the intra-cellular transformation which is predominant during the period of barn curing on the farm continues to take place after the leaf is moved to the packing plant and the bulk sweating is begun; likewise, those intra-cellular transformations which are predominant during the period of bulk sweating actually have their incipency while the leaf is still hanging in the curing barn on the farm.

Thus, for instance, the loss of moisture which is more rapid during the period of barn curing on the farm continues throughout the period of bulk sweating in the packing plant although at a slower rate. And the coloring of the leaf which commences in the curing barn also continues during the period of bulk sweating, the leaf becoming a deeper green, red or brown. The most notable chemical changes in the consistency of the leaf are a decrease in malic acid and nicotine content, which is continuous throughout the period of barn-curing and the period of bulk sweating; also a rise in the citric acid content during the period of barn-curing followed by a reduction of the citric acid content during the period of bulk sweating. This latter change, first in the accumulation and then in the loss of citric acid, is not a sudden change, but gradual,



and is believed to be due, not to the fact that the leaf is taken out of the curing barn and put into bulks in the packing plant but to the effect of other accompanying internal chemical changes and activities of intra-cellular micro-organisms.

During the period of bulk-sweating the leaf undergoes a most noticeable fermentation caused by the activities of intra-cellular micro-organisms. Although most pronounced during the period of bulk sweating, fermentation actually begins during the time that the leaf is still hanging in the curing barn on the farm. The process of bulk sweating is not for the purpose of causing such fermentation, but for the purpose of controlling and regulating it so as not to injure the leaf or destroy its flavor, aroma, burning qualities or its important color and general appearance, and so as to assure that all the leaves in an entire bulk will be affected uniformly and not haphazardly.

After the bulking process in the packing plant is completed and before the leaf is graded and baled, the leaf is remoistened, being sprayed with a fine spray. This remoistening, or "kasing," as it is called, is not for the purpose of stimulating or affecting the process of fermentation, but is for the purpose of keeping the leaf soft and pliable enough to withstand necessary handling without breakage or injury.

125 For the past several years, the total sales of tobacco by the May Tobacco Company at said packing plant in the City of Quincy have averaged between \$300,000 and \$350,000 per year and the total 1952 tobacco crop harvested from the farms of the May Tobacco Company as aforesaid and bulked, sorted, baled and handled in the said packing plant was approximately 112,000 pounds green weight. That the May Tobacco Company has not at any time received into or handled at its said packing plant any tobacco except that produced by the corporation on its own farms.

(S.) FRED L. MAY,

Sworn to and subscribed before me this 7 day of December, A. D. 1953.

(S.) A. D. MACON,

*Notary Public,  
State of Florida at Large.*

My commission expires July 5, 1954.

## In United States District Court

## PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO REVISE STATEMENT OF FACTS CONTAINED IN MEMORANDUM DECISION—Filed December 14, 1953.

Comes now the plaintiff, by his attorneys, in response to defendant's motion to revise statement of facts contained in the 126 memorandum decision in this matter and moves that said motion be denied on the grounds that the Court's statement of facts is amply and fully supported by the evidence in this matter.

In responding more particularly to the points stated in defendant's motion plaintiff would show the following:

1. Defendant moves to strike sentences on pages 4 and 6 of the Court's memorandum decision which state, in effect, that tobacco is cured until it reaches "a stage in the process of curing when it is ready for the packing house" and when tobacco has reached the proper "stage in the process of curing" it is taken from the curing barns to the packing house. The grounds for the motion are stated to be that the evidence does not show that tobacco reaches a stage or that it has to reach any particular stage at which it is moved from the barn to the packing house.

The plaintiff would respectfully show that defendant attached to its motion for summary judgment dated August 5, 1952, an affidavit of J. D. Vrieze, its general manager, beginning on page 5 of which 127 stages of curing the leaf in the barn are stated.

2. Defendant further moves the Court to strike its finding that "the packing houses are equipped with machinery for the appropriate humidification and curing of the tobacco."

Plaintiff would respectfully show that on page 5 of his affidavit dated August 4, 1952, Mr. J. D. Vrieze states that final curing of tobacco could be accomplished in the barn "if the barn had 127 proper temperature and atmospheric control." This certainly implied that such control is necessary and since tobacco is transferred to the packing house the packing house must have the necessary equipment for temperature and atmospheric control. More specifically, on page 12 of the affidavit of Robert O. Hesse, dated August 28, 1952, the controls and equipment necessary for bulk curing of tobacco are discussed in detail.

3. While it is true that the written record in this case contains no concessions by defendant as to the coverage of its warehouse No. 2 and No. 3, it is the recollection of plaintiff's attorneys that such representations were made at one or more of the several original conferences held before this Court.

4. Plaintiff objects to defendant's statement that "a majority of the employees who work on tobacco in the packing plant also work part of the time on the tobacco farms" on the grounds that it is

entirely immaterial and further that the record in this case contains no evidence to support such a statement.

5. Plaintiff objects to the affidavit of Robert F. Gardner tendered with defendant's motion on the grounds that it is immaterial and cumulative.

STUART ROTHMAN,

*Solicitor,*

BEVERLEY R. WORRELL,

*Regional Attorney,*

H. GRADY KIRVEN,

*Attorney,*

*United States Department of Labor,*

*Attorneys for Plaintiff.*

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In United States District Court

PLAINTIFF'S MOTION TO AMEND CONCLUSIONS CONTAINED IN  
MEMORANDUM DECISION—Filed December 44, 1953.

Comes now the plaintiff by his attorneys and moves the Court to amend its conclusions contained in the memorandum decision dated September 29, 1953, by striking therefrom on page 9, 11, and the last sentence under subtitle The King Edward Tobacco Company case which reads: "Having found and held that the taxing exemption ends when the tobacco reaches the receiving platform of the packing house, it is unnecessary to consider the relative scope and effect of clauses (6) and (10) of Section 13(a) of the Act in this case," and substitute in lieu thereof the following:

"The natural form in which the tobacco matures in the field has been substantially changed by the drying and redrying processing before it reaches defendant's plants. Operations in the bulking houses constitute processing of a type not enumerated in Section 13(a) (6) and that section therefore has no application to the employees there engaged in those operations."

As grounds heretofore plaintiff would respectfully show that the foregoing conclusions are amply supported by the facts in this case and would eliminate any possible uncertainty as to the

129 Court's ruling in this matter.

Respectfully submitted,

STUART ROTHMAN:

*Solicitor,*

BEVERLEY R. WORRELL,

*Regional Attorney,*

H. GRADY KIRVEN,

*Attorney,*

*United States Department of Labor,*

*Attorneys for Plaintiff.*

Certificate of Service (omitted in printing)

130 In United States District Court, in and for the Northern  
District of Florida, Tallahassee Division.

Case No. 305-T-Civ.

MARTIN P. DURKIN, SECRETARY OF LABOR, UNITED STATES DEPART-  
MENT OF LABOR, PLAINTIFF

VS.

JOSEPH T. BUDD, JR. AND FLORENCE W. BUDD, CO-PARTNERS, DOING  
BUSINESS AS J. T. BUDD, JR. AND COMPANY, DEFENDANTS.

Case No. 340-T-Civ.

MARTIN P. DURKIN, SECRETARY OF LABOR, UNITED STATES DEPART-  
MENT OF LABOR, PLAINTIFF

VS.

KING EDWARD TOBACCO COMPANY OF FLORIDA, A FLORIDA CORPORA-  
TION, DEFENDANT.

SUPPLEMENTAL MEMORANDUM DECISION AND ORDER ON MOTIONS TO  
REVISI STATEMENTS CONTAINED IN MEMORANDUM DECISION HERE-  
TOFORE FILED AND ON PLAINTIFF'S AND DEFENDANT'S MOTIONS  
FOR SUMMARY JUDGMENT IN THE MAY CASE. Filed December  
17, 1953.

Defendant, King Edward Tobacco Company, has filed herein a  
motion to revise certain statements of facts contained in the memo-  
randum decision herein, which will be considered and disposed of  
separately.

131 1. On page  $\approx 5$  of the memorandum decision defendant  
moves to delete the sentence, "This drying process is repeated  
until the tobacco has reached a stage in the process of curing when  
it is ready for the packing house", and substitute in lieu thereof,  
"This drying process is continued until the tobacco is moved from  
the barn to the packing plant", or words to the same general effect.

The Court finds no appreciable difference in the meaning and  
effect of the language used in the memorandum decision and in the  
revision requested by counsel for defendant and the motion in this  
respect is denied.

2. Counsel for defendant also moves the Court to delete from  
page  $\approx 7$  the following sentence, "When the tobacco reached the  
stage in the process of curing when it was ready for the packing  
house the King Edward Tobacco Company took it to one of its  
packing houses where no other tobacco was processed and made  
ready for market", and substitute in lieu thereof, "When the tobacco  
is moved from the barn it is taken to one of the packing plants



of King Edward Tobacco Company in which the tobacco of no other grower is handled"; or words to the same general effect.

The Court finds no factual difference in the meaning and effect of the language used in the memorandum decision and in the revision requested by counsel for defendant. Each correctly state the facts, but the Court will adhere to the language used in the memorandum decision and the motion in this respect is also denied.

132 II. Counsel for defendant further moves the Court to delete the words, "The packing houses are equipped with machinery for the appropriate humidification and curing of the tobacco" appearing on page  $\approx 5$ , upon the ground there is no evidence or showing that the packing plants are equipped with machinery.

This statement may be accurate as to the case made out by King Edward Tobacco Company, but upon the whole, viewed before the Court it clearly and very definitely appeared that the packing houses are equipped with machinery for the appropriate humidification and curing of the tobacco and no harm is done to King Edward Tobacco Company case by retaining this language in the memorandum decision. Motion to delete is therefore denied.

III. Counsel for defendant further moves the Court to delete words appearing near the bottom of page  $\approx 7$  as follows: "and defendant concedes that these packing houses operations are subject to the Act"; on the ground that the affidavits or evidence herein do not show that defendant "concedes" or admits that such operations are subject to the Act, but such evidence shows at most that the defendant is not in violation of the Act at such other packing houses.

Obviously, in cases of this character the Court has latitude in expressing in its own language what the facts in a case show. The facts in this case clearly established that defendant operates two other packing houses in the same area; that these packing houses are not involved in this litigation because they were found not to be in violation of the Act. While the Court could have

133 used some word more pleasing to defendant than "concedes" the effect would have been the same and for this reason the Court sees no necessity for amending the memorandum decision as requested. The motion to delete is denied.

IV and V. Counsel for defendant further moves the Court to add to the paragraph ending on page  $\approx 6$ , immediately preceding the heading, "The Budd Case", the following:

"A majority of the employees who work on tobacco in the packing plant also work part of the time on the tobacco farms".

and in support thereof defendant has filed and requests the Court to receive and consider an affidavit of recent date filed herein

by Robert F. Gardner, which shows that on October 21, 1953 at the height of the packing season of type #62 cigar leaf wrapper tobacco, a survey was made of the employees of the King Edward Tobacco Company present and working on that date in and about the packing plant involved in this suit and that 83 of the 93 employees present had worked continuously with this type of tobacco on some tobacco farm from the time of planting until the date of survey, including participation in the growing, harvesting and barn curing of such tobacco.

At the time of the trial it was repeatedly asserted by counsel for defendants and never denied by counsel for plaintiff that more than 50% of the employees who worked on tobacco in the 134 packing plant also worked part of the time on the tobacco farms and his memorandum decision may be considered as a finding of this additional fact.

Counsel for plaintiff moves the Court to amend the memorandum decision heretofore filed herein by striking therefrom on page 79 thereof the following:

Having found and held that the farming operation, even when the tobacco reaches the receiving platforms of the packing house, it is unnecessary to consider the relative scope and effect of Chapters 16 and 10 of Section 13(a) of the Act in this case" and substitute in lieu thereof the following:

"The nature, form in which the tobacco starts in the field has been substantially changed in the drying and relieving process before it reaches defendant's plants. Operations in the bulking houses constitute processing of a type not enumerated in Section 13(a)(10) and that Section, therefore, has no application to the employees there engaged in those operations."

The ground assigned for the change is that the proposed language is amply supported by the facts in this case and would eliminate any possible uncertainty as to the Court's ruling.

The Court is not convinced that anyone will be confused by the language used and further is unwilling to accept and approve the limited approach to the question at issue in this case suggested in the proposed language. Therefore, plaintiff's motion to amend is denied.

When this case was presented to the Court, counsel for the parties and the Court were laboring under the impression that motions for summary judgment had been filed by plaintiff and defendant, May Tobacco Company, but it developed subsequently

that neither plaintiff nor defendant had filed such motion. Plaintiff now filed a motion for summary judgment, with notice to the Court that no further hearing thereon is requested and the Court having considered said motions and being fully advised in the premises adheres to the decision heretofore reached in the May Tobacco Company case in its prior memorandum decision and pursuant thereto it is

Ordered and Adjudged that intervenor's motion for summary judgment be and the same is hereby denied.

It is further Ordered and Adjudged that plaintiff's motion for summary judgment against the May Tobacco Company intervenor be and the same is hereby granted.

Done and Ordered at Tallahassee, Florida, this 17th day of December, 1953.

ROBERT A. DE VANE,  
*United States District Judge*

U.S. District Court for the Northern District  
of Florida, Tallahassee Division

Civil Action No. 340

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

KING EDWARD TOBACCO COMPANY OF FLORIDA, A FLORIDA CORPORATION, DEFENDANT

MAY TOBACCO COMPANY, COMMISSIONER, EXHIBITOR

FINAL DECISION - Filed January 4, 1954

The above styled cause came on for hearing before this Court sitting without a jury, on cross motions for summary judgment heretofore filed by the respective parties. Upon consideration of the pleadings and the stipulations, affidavits and other evidence filed herein and this cause having been submitted to the Court on the entire record and the arguments and briefs of counsel for the respective parties, and findings of fact and conclusions of law having been made and filed herein,

Now, therefore, sufficient cause therefor appearing and upon the findings of fact and conclusions of law contained in the memorandum decision filed herein and dated September 29, 1953, as amended, it is

Ordered, Adjudged and Deceeed that the defendants, King

Edward Tobacco Company of Florida and May Tobacco  
 137 Company; their officers, agents, servants, employees, attor-  
 neys and all persons acting, or claiming to act, in their behalf  
 and interest, be, and they hereby are, permanently enjoined and  
 restrained from violating the provisions of Sections 15(a)(1), 15  
 (a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938  
 as amended (Act of June 25, 1938, 52 Stat. 1060, as amended by  
 63 Stat. 919; U.S.C. Ti. 29, Sec. 201, et seq.) hereinafter referred  
 to as the Act, in any of the following manners:

(1) The defendants shall not, contrary to Section 6 of the Act,  
 pay to any of their employees who are engaged in the production of  
 goods for interstate commerce, as defined by the Act, wages at  
 rates less than seventy-five (75) cents an hour.

(2) The defendants shall not, contrary to Section 15(a)(1) of  
 the Act, ship, deliver, transport, offer or transportation or sell in  
 interstate commerce, as defined by the Act, or ship, deliver or sell  
 with knowledge that shipment, delivery or sale thereof in interstate  
 commerce is intended, any goods in the production of which any  
 employee of the defendants has been employed at rates of pay less  
 than those specified in paragraph (1) of this judgment.

(3) The defendants shall not fail to make, keep, and preserve  
 records of their employees; and the wages, hours and other conditions  
 and practices of employment maintained by them, as prescribed  
 by the regulations of the Administrator issued, and from time to  
 time amended, pursuant to Section 11(c) of the Act and found in

138 Title 29, Chapter V, Code of Federal Regulations, Part 516.

It is further Ordered that nothing in this judgment shall  
 be construed to prevent the shipment, delivery or sale by de-  
 fendants in interstate commerce of any goods which they now have  
 on hand in the production of which any of their employees may have  
 heretofore been employed in violation of Section 6 of the Act.

It is further Ordered that costs be, and they hereby are taxed  
 against the defendants for which execution may issue.

Dated this 30th day of December, 1953

DOZIER A. DEVANE,  
*United States District Judge.*

In United States District Court for the Northern District of  
 Florida, Tallahassee Division

(Title Omitted)

NOTICE OF APPEAL—filed February 23, 1954

Notice is hereby given that King Edward Tobacco Company  
 of Florida, a Florida corporation, defendant above named, hereby



appeals to the United States Court of Appeals for the Fifth  
139 Circuit from the final judgment bearing date December 30,  
1953, and entered in this action on January 4, 1954.

(S.) EDW. MCCARTHY.

423 Atlantic National Bank Bldg.,  
Jacksonville, Florida.

(S.) RICHARD J. GARDNER.

Quincy, Florida.

*Attorneys for King Edward  
Tobacco Company of Florida*

(Certificate of service omitted)

In United States District Court for the Northern District of  
Florida, Tallahassee Division.

Title (omitted)

SUBJECT: APPEAL. filed February 23, 1954

Notice is hereby given that May Tobacco Company, a corporation,  
intervener above named, hereby appeals to the United  
140 States Court of Appeals for the Fifth Circuit from the final  
judgment bearing date December 30, 1953, and entered in  
this action on January 4, 1954.

Attest: SMOOTHER & DENNO

By: S. MITCHELL, C. DENNO

*Attorneys for May Tobacco  
Company*

1625 K Street, N.W.  
Washington 6, D.C.

(Certificate of service omitted)

Cost Bond in the sum of \$250.00 filed by King Edward Tobacco  
Company of Florida, February 23, 1954, with St. Paul Mercury  
Indemnity Company, a Delaware corporation, as Surety.

Cost Bond in the sum of \$250.00 filed by May Tobacco Company  
February 23, 1954, with St. Paul Mercury Indemnity Company,  
a Delaware corporation, as Surety.

141

## In United States District Court

MOTION TO STAY INJUNCTION PENDING APPEAL—Filed February 23,  
1954

Comes now the defendant King Edward Tobacco Company of Florida, having filed its notice of appeal to the Court of Appeals for the Fifth Circuit from the final judgment dated December 30, 1953, herein entered January 4, 1954, and moves the Court to stay the permanent injunction granted herein in and by said final judgment, pending the appeal herein from said final judgment.

Dated this 23rd day of February, 1954

EDW. MCCARTHY

423 Atlantic National Bank Bldg.  
Jacksonville, Florida.

RICHARD J. GARDNER,

Quincy, Florida.

*Attorneys for King Edward  
Tobacco Company of Florida.*

142

## In United States District Court

MOTION TO STAY INJUNCTION PENDING APPEAL—Filed February 23,  
1954

Comes now the intervenor May Tobacco Company, having filed its notice of appeal to the Court of Appeals for the Fifth Circuit from the final judgment dated December 30, 1953, herein entered January 4, 1954, and moves the Court to stay the permanent injunction granted herein in and by said final judgment, pending the appeal herein from said final judgment.

Dated this 23 day of February, 1954

POOLE, SHROYER &amp; DENBO,

By (S.) MILTON C. DENBO,

1625 K Street N.W.,  
Washington, D. C.*Attorneys for May Tobacco  
Company.*

(Certificate of Service omitted.)

143

In United States District Court

ORDER GRANTING MOTIONS TO STAY INJUNCTION PENDING APPEAL  
Filed February 23, 1954

This cause came on to be heard upon separate motions of the defendant King Edward Tobacco Company of Florida and of the intervener May Tobacco Company for an order staying the permanent injunction granted herein by final judgment of this Court dated December 30, 1953, herein entered January 4, 1954, during the pendency of appeal taken from said final judgment to the Court of Appeals for the Fifth Circuit, and good cause appearing therefor, it is

Ordered that a stay of said permanent injunction and final judgment is hereby allowed, without additional bond, during the pendency of said appeal.

Dated at Tallahassee, Florida, February, 23rd, 1954.

(S.) DOZIER A. DEVANE,

United States District Judge.

144

In United States District Court

NOTICE UNDER RULE 75(c) FRCP Filed February 24, 1954

To: Beverley R. Worrell, Esq.

Plaintiff's Attorney,

1908 Comer Building,

Birmingham 3, Alabama.

Milton C. Denbo, Esq.,

Attorney for May Tobacco Company,

1625 K Street, N.W.,

Washington 6, D.C.

There is herewith served upon you, pursuant to Rule 75(c) of the Federal Rules of Civil Procedure, a proposed statement of certain facts and proceedings not stenographically reported, and you are hereby notified to serve your objections or proposed amendments thereto within ten (10) days after service upon you. Thereupon, said statement, with such objections or proposed amendments thereto as you may serve, will be submitted to the said District Court for settlement and approval in accordance with said Rule.

Copy of the "columnar chart" referred to in said proposed

statement is not attached, having already been delivered to you June 30, 1953, at Tallahassee.

Dated this 23rd day of February, 1954.

Ed. McCarthy.

423 Atlantic National Bank Bldg.

Jacksonville 2, Fla.

RICHARD J. GARDNER.

Quincy, Florida.

*Attorneys for Defendant King  
Edward Tobacco Company  
of Florida.*

145 State of Florida,  
County of Duval.

Edward McCarthy, being first duly sworn, deposes and says that on February 23rd, 1954, he mailed a true copy of the foregoing notice and statement of facts thereto attached, to Beverley B. Worrell, Esq., plaintiff's attorney, 1908 Comer Building, Birmingham, Alabama, and to Milton C. Denbo, Esq., Attorney for May Tobacco Company, 1625 K Street, N.W., Washington 6, D. C.

Edw. McCarthy.

Sworn to and subscribed before me this February 23, 1954.

BETTIE ZOERB.

(Seal)

*Notary Public, State of Florida at large.*

My commission expires Jan. 40, 1955.

PROPOSED STATEMENT OF CERTAIN FACTS AND PROCEEDINGS NOT  
STENOGRAPHICALLY REPORTED

The Pre-trial Conference and hearing on the Motion of May Tobacco Company to intervene, noticed for December 10, 1952, was re-set by the Court for December 17, 1952, at Tallahassee. At such hearing on December 17, 1952, the Court granted the motion to intervene, and suggested to Plaintiff's counsel that all other tobacco packing plants in Gadsden County, Florida, which were not then in compliance with the Fair Labor Standards Act, be brought into Court, either in the causes then pending or in separate suits, and announced that the pre-trial conference would be deferred until such time as such other packing plants were before the Court.

Thereafter, and after Plaintiff had filed separate suits against nine other Defendants, and after answers were filed by all such Defendants, the Court by letter to counsel set a pre-trial conference in all eleven cases for June 30, 1953, at Tallahassee.



At such conference on June 30, 1953, Defendants' counsel presented to and filed with the Court as an Exhibit a "columnar chart" which is hereto attached and made a part hereof. Instead of proceeding with the pre-trial conference, the Court suggested that all parties in the Budd Case (No. 305) and the King Edward Case (No. 340), including the Intervenor May Tobacco Company, file motions for summary judgment, saying that the other nine cases would be held in abeyance until such motions should be disposed of.

On December 17, 1953, by letter to Defendants' Counsel, the Court stated that it was the Court's intention to enter final judgments only in the Budd, King Edward and May Cases, and leave all the other cases pending until the Court of Appeals disposed of the Budd, King Edward and May Cases.

147 Served by mail February 23rd, 1954

Erw. McCarthy

123 Atlantic National Bank Building  
Jacksonville 2, Fla.

RICHARD J. GARDNER

*Attorney for King Edward  
Tobacco Company of Florida*

Quincy, Florida

(Here follows 1 Photolithograph, side folio 148)



	Name of Defendant	Unit #	Defendant's total farm acreage	Defendant's tobacco cultivation	Defendant's "shade" acreage	Shade acreage of other farmers	Total shade acreage supplied by defendant	Max. distance from defendant's plant	Number Packing Plants	Number Plants in Summary		Total shade acreage supplied by defendant	Max. distance from defendant's plant	Number Packing Plants	Number Plants in Summary	Number Plantain in Madison	Number Plantain on time	Number Packing Plant employees	Number who live on time	Tobacco grown in farmer's home	Packing cost paid by farmer		
	J. T. Budd Jr. & Co.	305				263	263		1	1		263		1	1			108			yes		
(1)*	King Edwards Tobacco Co.	340	3860	892	206		206	25	1	*	1	206	25	1	*	1		120	Large proportion	yes	yes		
	May Tobacco Co.	340	2753	423	90		90	10	1	1		90	10	1	1			70	Practically all	yes	yes		
	Henry Weinberg & Co. Hy Weinberg Jr.	386	860	550	62	247	409	18	2	1		409	18	2	1	1		200	Practically all	yes	yes		
(2)*	Gadsden Tab. Leaf Co.-Op. Inc.	387	4350	1395	175*		175	12	1	1		175	12	1	1			131	all except 20030	yes	yes		
	Woodward Leaf Tab. Co.	388	1994	600	39	12	57	9	1	1		57	9	1	1			44	Practically all	yes	yes		
	Embrey Tab. Co. of Fla.	389	1139	387	103	32	135	15	1	1		135	15	1	1			180	98%	Partly	yes		
	Umev. Sumatra Tab. Corp.	390	1908 1/2	2710 3/4	880		880	15	4	2		880	15	4	2	1	1	582	Practically all	yes	yes		

	Umev. Sumatra Tab. Corp.	390	1908 1/2	2710 3/4	880		880	15	4	2		880	15	4	2	1	1	582	Practically all	yes	yes		
(2)*	Lone Leaf Tab. Corp.	391	3340	786	107*	43	150	20	1	1		150	20	1	1			80	all except 10000	Partly	yes		
	Lee H. Batt, Inc.	392				87 1/2	87 1/2	20	1	1		87 1/2	20	1	1			65		no			
	A. E. Carry.	393	3000	506	108		108	12	1	1		108	12	1	1			50	all	yes	yes		
	Totals		4037 1/2	8529 3/4	1770	784 1/2	2554 1/2		15	11		2554 1/2		15	11	1	3	1630					

(1)\* King Edwards Tobacco Co. has 2 other packing plants not in this litigation.

(2)\* The 175a. of "shade" are farmed by the members of Gadsden Tab. Leaf Co.-Op. Inc.

(3)\* Of the 107a. of "shade" farmed by Lone Leaf Tab. Corp., 44a. are farmed on a partnership basis with other farmers.

not in this litigation.

Gadsden Tab. Leaf Co.-Op. Inc. if, 44a. are farmed on a 50-50



149

In United States District Court

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S PROPOSED STATEMENT OF  
FACTS UNDER RULE 75(n), FEDERAL RULES OF CIVIL PROCEDURE—  
Filed March 5, 1954.

Comes now the plaintiff by his attorneys and objects to defendants' proposed "Statement of Certain Facts and Proceedings not Stenographically Reported" on the following grounds that:

(1) Defendants' proposed statement of facts and exhibit attached thereto do not pertain to evidence or proceedings at a trial or hearing within the meaning of Rule 75(n), Federal Rules of Civil Procedure.

(2) Defendants' proposed statement of facts and exhibit attached thereto are not, and never have been, any part of the record in this case stenographically unreported or otherwise and they are, therefore, not properly subject to consideration under Rule 75(n) of the Federal Rules of Civil Procedure.

(3) Defendants' proposed statement of facts, and particularly the exhibit attached thereto, are inadmissible by reason of incompetency, immateriality and irrelevancy.

(4) Defendants' proposed statement of facts is inaccurate insofar as it states an Exhibit, a "columnar chart", was filed with the Court.

150 It is our recollection it was handed to Court and counsel and represented to be a summary of the status of the various parties pending before the Court but that it was not filed or offered as a part of the record as indeed it could not have been.

Now, Therefore, plaintiff moves that his objections be sustained and defendants' motion be denied.

STUART ROTHMAN,

*Solicitor,*

BEVERLEY R. WORRELL,

*Regional Attorney,*

NORMAN H. WINSTON,

*Attorney,*

*United States Department of Labor,*

*Attorneys for Plaintiff.*

Certificate of Service (omitted in printing)



151 In United States District Court

## STATEMENT OF CERTAIN FACTS AND PROCEEDINGS NOT STENOGRAPHICALLY REPORTED—Filed February 24, 1954

The Pre-trial Conference and hearing on the motion of May Tobacco Company to intervene, noticed for December 10, 1952, was re-set by the Court for December 17, 1952, at Tallahassee. At such hearing on December 17, 1952, the Court granted the motion to intervene, and suggested to plaintiff's counsel that all other tobacco packing plants in Gadsden County, Florida, which were not then in compliance with the Fair Labor Standards Act, be brought into Court, either in the causes then pending or in separate suits, and announced that the pre-trial conference would be deferred until such time as such other packing plants were before the Court.

Thereafter, and after plaintiff had filed separate suits against nine other defendants, and after answers were filed by all such defendants, the Court by letter to counsel set a pre-trial conference in all eleven cases for June 30, 1953, at Tallahassee.

At such conference on June 30, 1953, defendants' counsel presented to and filed with the Court as an exhibit a "columnar chart",

which is hereto attached and made a part hereof. At the  
152 conclusion of the pre-trial conference, the Court suggested that all parties in the Budd Case (No. 305) and the King Edward Case (No. 340), including the Intervener May Tobacco Company, file motions for summary judgment, saying that the other nine cases would be held in abeyance until such motions should be disposed of. This was promptly done by all parties in these cases.

On December 17, 1953, by letter to defendants' counsel, the Court stated that it was the Court's intention to enter final judgments only in the Budd, King Edward and May Cases, and leave all the other cases pending until the Court of Appeals disposed of the Budd, King Edward and May Cases.

Served by mail February 23rd, 1954.

(S.) EDW. MCCARTHY.

423 Atlantic National Bank Bldg.,  
Jacksonville, Fla.

(S.) RICHARD J. GARDNER.

Quincy, Fla.

*Attorneys for King Edward  
Tobacco Company of Florida.*

(Changes shown (on original) in handwriting made by the Court.)

(S.) DOZIER A. DEVANE.

*Judge.*

\* Columnar chart not reproduced here is the columnar chart filed February 24, 1954.

153

In United States District Court

ORDER OF COURT APPROVING REVISED STATEMENT OF CERTAIN FACTS  
AND PROCEEDINGS NOT STENOGRAPHICALLY REPORTED—Filed  
March 19, 1954

This matter came on for hearing before the Court on Notice under Rule 75(n) of the Federal Rules of Civil Procedure for approval of a proposed statement of certain facts and proceedings not stenographically reported, and the Court having considered the same and objections filed by counsel for plaintiff thereto, has modified, in its own handwriting, such changes as should be made in the statement and as modified said statement is hereby approved.

Done and Ordered at Tallahassee, Florida, this 19th day of March, 1954.

DOZIER A. DEVANE,

*United States District Judge.*

154-158 Appellant's Designation of Record Proceedings and Evidence to be Included in Record on Appeal. (omitted in printing)

159 Designation by Appellant, May Tobacco Company, of Record, Proceedings, and Evidence to be Included in Record on Appeal. (omitted in printing)

160

In United States District Court

## MOTION FOR EXTENSION OF TIME TO FILE RECORD ON APPEAL—

Filed March 23, 1954

Come now the defendant King Edward Tobacco Company of Florida, a Florida corporation, and the intervener May Tobacco Company, a corporation, by their respective undersigned  
 161 counsel, and show to the Court that additional time is needed within which to prepare and file the record on appeal herein to the United States Court of Appeals for the Fifth Circuit from the final judgment bearing date December 30, 1953, and entered in this action on January 4, 1954.

Wherefore, said defendant and said intervener jointly pray for an extension of fifty (50) days from and after April 4, 1954, within which to prepare and file said record on appeal.

Dated this March 20, 1954.

EDW. MCCARTHY,

423 Atlantic National Bank Building,  
 Jacksonville 2, Florida.

Quincy, Florida.

1625 K Street, North West,  
 Washington 6, D. C.

RICHARD J. GARDNER,  
*Attorneys for King Edward  
 Tobacco Company of Florida,*  
 MILTON C. DENBO,  
*Attorney for Intervener  
 May Tobacco Company.*

162

In United States District Court

## ORDER EXTENDING TIME TO FILE RECORD ON APPEAL—Filed March 23, 1954

The joint motion of the defendant King Edward Tobacco Company of Florida and the intervener May Tobacco Company to extend the time within which to file record on appeal in the above entitled cause to the United States Court of Appeals for the Fifth Circuit from the final judgment bearing date December 30, 1953, and entered in this action on January 4, 1954, is hereby granted, and it is

Ordered that the time within which to file the record on appeal in the above entitled cause be, and the same is hereby, extended to and including the 24th day of May, 1954. Copy of said joint motion and of this order shall be included in said record on appeal.



Done and Ordered at Tallahassee in the District aforesaid this 23rd day of March, A. D. 1954.

DOZIER A. DEVANE;  
*United States District Judge.*

163-164 Clerk's Certificate to foregoing transcript omitted in printing.

165 MINUTE ENTRY OF ARGUMENT AND SUBMISSION—January 31, 1955

(omitted in printing)

166 IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15016

JOSEPH T. BUDD, JR., and FLORENCE W. BUDD, co-partners, doing business as J. T. BUDD, JR. and Company, APPELLANTS

versus

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor, APPELLEE

and

No. 15071

KING EDWARD TOBACCO COMPANY OF FLORIDA and MAY TOBACCO COMPANY, INTERVENOR, APPELLANTS

versus

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor, APPELLEE

*Appeals from the United States District Court for the Northern District of Florida*

OPINION—April 15, 1955

167 Before HUTCHESON, Chief Judge, and RIVES and TUTTLE, Circuit Judges.

RIVES, Circuit Judge: The opinion of the district Court in these cases is reported at 114 F. Supp. 865. The Budd case was the action first brought by the Secretary of Labor under Section 17 of the

Fair Labor Standards Act<sup>1</sup> to enjoin the Budds from violating the minimum wage and record keeping provisions of the Act. At the conclusion of a pre-trial conference on that case, the district court was of the opinion that the Budd company operation was in violation of the Act, but, in order to avoid putting the small farmers, whose tobacco was processed by the Budds, at an economic disadvantage to the operators who processed their own tobacco exclusively, the court insisted that before decision in the Budd case, the issues be broadened to include such large operations. Accordingly, suit was brought against the King Edward Company and the May Company intervened.

The cases involve the definition of "Agriculture" under Title 29 U.S.C.A. Section 203(f),<sup>2</sup> the agricultural exemptions under Section 213(a), clauses 6 and 10,<sup>3</sup> and incidentally the exemption 168 from the maximum hours provision under Section 207(c).<sup>4</sup>

<sup>1</sup> Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U.S.C.A. 201, et seq., as amended by the Fair Labor Standards Amendments of 1949, c. 726, 63 Stat. 910.

<sup>2</sup> "(f) 'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(2) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

<sup>3</sup> "§213. Exemptions

"(a) The provisions of sections 206 and 207 of this title shall not apply with respect to \* \* \* (6) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a share-crop basis, and which are used exclusively for supply and storing of water for agricultural purposes; \* \* \* (f) any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; \* \* \*

<sup>4</sup> "§ 207. Maximum hours"

"(c) In the case of an employee engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy



All of appellant's processing operations are in connection with U.S. Type 62 Sumatra tobacco, which is a leaf tobacco grown and used entirely for cigar wrappers. This type of tobacco is grown exclusively in three counties in North Florida and two counties in South Georgia contiguous to two of said Florida counties. Most of such tobacco is grown within an airline radius of thirty miles of Quincy, the County Seat of Gadsden County, Florida.

We quote from the opinion of the district court:

"Method of Growing, Harvesting and Marketing Type 62 Shade Leaf Tobacco

Type 62 shade leaf tobacco requires special and painstaking cultivation, harvesting, curing and preparation for market. It grows in fields inclosed in a cheesecloth shade, which  
169 completely covers and incloses the tobacco field. The cheesecloth is supported by wires strung on posts placed at regular intervals through the fields. It is highly fertilized and intensively cultivated during the growing period. When each leaf reaches a certain stage of maturity it is promptly harvested. This harvesting process is known as "priming". The lower leaves are picked first, perhaps not more than two or three from each stalk. This picking is repeated as the tobacco matures on up the stalk until all the marketable leaves have been removed. At each priming the tobacco is immediately taken to a tobacco barn located on the farm where it is strung on sticks and dried by means of heat. When the tobacco is almost completely dried the drying process is interrupted and it is permitted to absorb moisture and again dried. This drying process is repeated until the tobacco has reached

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products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into sirup, the provisions of subsection (a) of this title shall not apply to his employees in any place of employment where he is so engaged, and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a) of this title, during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees at any place of employment where he is so engaged.



a stage in the process of curing when it is ready for the packing house.

"It is then taken from the barns in the field, placed in appropriate containers and carried to the packing house where it is placed in piles known as 'bulks' for curing. Each bulk consists of more than 3000 lbs. of tobacco. The packing houses are equipped with machinery for the appropriate humidification and curing of the tobacco. During the curing period the temperature within each bulk is closely watched from day to day and at regular intervals, when the appropriate time has arrived, the bulk is broken up, the tobacco leaves shaken out and those on the outside placed on the inside of the new bulk and those on the inside placed on the outside for further curing.

170 This process is continued until the tobacco is ready for market when it is baled (sic) for shipment." *Durkin v. Budd*, 114 F. Supp. 865, 866-867.

After such processing, this type tobacco falls into eight main classifications, and none of those classifications can be determined prior to the processing. Primarily, because it cannot be graded until it has been processed, there is no market at an earlier stage for this type tobacco. The market variation dependent upon grading is considerable, ranging from a high of approximately \$2.40 per pound down to as low as \$.40 per pound.

Some 300 farmers in the Quincy area grow this type of tobacco with about 80% growing and harvesting less than 25 acres per year, and a majority producing only 1-1½ to 10 acres per year. As has been noted, the natural heating, fermentation, and curing of this tobacco requires bulks of more than 3000 lbs. of tobacco. The small farmers do not grow the tobacco in such quantities, and, hence, cannot process their own tobacco. For the year 1950, some 52 of such small farmers cultivating a total of 263 acres had their tobacco processed by the Budd Company. That company grows no tobacco of its own but processes tobacco grown by others.

During 1950, the King Edward Tobacco Company cultivated 206 acres, and the May Company 90 acres of this type tobacco, and those two companies processed their own tobacco, and did not handle the tobacco of any other person at the packing houses here involved. Those packing houses are located in the town of Quincy, which, according to the 1950 census had a population of 171 6,586, and the Budds' packing house is also in that town. At

the height of the packing season, May employs approximately 70 employees in its packing plant, King Edward some 120 employees, and Budd approximately 108 employees. The majority of all such employees work also on the farms when not engaged in

work at the packing plants. Other pertinent facts appear in the opinion of the district court.

King Edward and May claim that their employees are exempt from the provisions of the Act under Section 213(a)(6) because they are employed in agriculture. As to King Edward and May, the appellee concedes that:

"Appellants are admittedly 'farmers' in their growing operations, and admittedly the mere fact that they are large growers does not affect the availability of the exemption to them insofar as they are in fact farmers.<sup>5</sup> But obviously appellants are also something else in addition to being growers—they are also operating separate and extensive commercial enterprises, of the same character as similar independently owned and operated packing houses."

The district court held "that upon the record in this case the farming exemption ends when the tobacco reaches the receiving platform of the packing house. \* \* \*". 114 F. Supp. 868. We cannot agree. It seems clear to us that a farmer cannot function without a market, that everything done by these farmers was essential for the marketing of their crops, and that the work of their packing house employees, in the preparation for market of the leaf grown exclusively on their farms, constitutes "practices performed by a farmer as an incident to or in conjunction with such farming operations, including preparation for market," within the meaning of Section 203(f).<sup>6</sup>

All of the appellants claim that their employees are exempt from the Act by virtue of Section 213(a)(10) [see footnote 3, *supra*], because their operations are one of those enumerated in that section and necessary for the marketing of their crops, and because the Administrator exceeded his authority in excluding from the "area of production," "any city, town or urban place of 2,500 or greater population." Appellee concedes, as it must, that this Circuit has already held that the Administrator did so exceed his authority.<sup>7</sup>

<sup>5</sup> See *Addison v. Holly Hill Fruit Products Co., Inc.*, 332 U.S. 607, 614, 615; *N.L.R.B. v. John W. Campbell, Inc.*, 5th Cir., 159 F. 2d 184, 187; *Waialua Agricultural Co. v. Maneja*, 9th Cir., 216 F. 2d 466, 474, 475.

<sup>6</sup> See *Farmers Irrigation Co. v. McComb*, 337 U.S. 755; *Addison v. Holly Hill Fruit Products Co., Inc.*, 332 U.S. 607; *N.L.R.B. v. John W. Campbell, Inc.*, 5th Cir., 159 F. 2d 184, 187; *Waialua Agricultural Co. v. Maneja*, 9th Cir., 216 F. 2d 466; *American Sumatra Tobacco Corp. v. Tone*, (Conn.) 13 Atl. 2nd 80.

<sup>7</sup> *Jenkins v. Durkin*, 5th Cir., 208 F. 2d 941; *Lovvorn v. Miller*, 5th Cir., 215 F. 2d 601. Cf. *Tobin v. Traders Compress Co.*, 10th



Appellee insists, however, that after it reached the packing house, the tobacco was no longer an "agricultural or horticultural commodity", and that the processing operation was not one of those enumerated in the section. The legislative history of Section 213(a)(10) makes clear that its primary purpose was to prevent discrimination against the small farmer. When it is considered that admittedly the processing was essential for the marketing of the tobacco, again it seems clear to us that the

Cir., 199 F. 2d 8. It seems particularly clear that the Administrator did exceed his authority as to the area of production involved in this particular case.

8 "Mr. Schwollenbach. . . . If we leave the bill the way it now stands, it is going to mean that the large producer on the large ranch who can afford to maintain the equipment on his own ranch is going to have an unfair advantage over the small man who has only 5 or 10 acres, and who has to send his crop to a central warehouse, or who may join with others in a cooperative warehouse, and there have the same processes performed." 81 Cong. Rec. 7659.

"But it seems that, so long as they remain in their natural state and all of the work that is done upon them is the ordinary agricultural operation up to the point of processing, whether they are handled on the farm or by a group of men gathered together in a cooperative, or turned over to a central warehouse, they should be exempt, because of the fact that if we do not exempt them, we are giving the large producer a very distinct advantage over the small producer, and I am certain that it is not the purpose of the bill and is not within the economic theory of the bill to give the large producer an advantage over the small producer." (Emphasis supplied.) 81 Cong. Rec. 7660.

"Mr. Schwollenbach. The amendment is very strictly drawn in an effort to limit the operations defined therein purely to those of an agricultural nature. \* \* \*. In other words, in a small apple operation of 5 or 10 or 15 or 20 acres, it is not possible for the owner of the ranch to purchase and maintain on the ranch the necessary machinery which is required in the washing operation under the rules and regulations of the Department of Agriculture. It is not possible for him to provide on his ranch the necessary storage space to store the apples until such time as it is possible to take them to market. It is not possible on the small ranch to supply the space for packing the apples. Therefore, it is necessary for such a farmer either to join other farmers in a cooperative, or to send his apples to a packing house, and have these operations, which are purely agricultural operations, performed elsewhere than at the site of the ranch or the farm.

"The purpose of this amendment is to give protection against that situation, and to make it possible for the small fruit and vegetable



employees of all of the appellants are exempt under Section 213(a)(10). Since we are of the opinion that the employees are exempt under Section 213(a)(10), we do not feel called upon to discuss the respective fields of operation of the total exemption in that Section and of the partial exemption in Section 207(c) further than to say that we agree with the Ninth Circuit that such exemptions overlap and are not alternative or mutually exclusive. *Wabasha Agricultural Co. v. Maneja*, 9th Cir., 178 F. 2d 603, 609.<sup>2</sup>

Appellee insists, however, that Section 213(a)(10) is inoperative until the Administrator makes a valid definition of the area of production. That much may be granted, but in a case like this, otherwise within the exemption, and which might likely fall with a valid definition of the area of production, the appellee is in no position to seek the equitable remedy of injunction until such definition has been made.<sup>19</sup>

The judgments are, therefore, reversed and the causes remanded with directions to enter judgments for the defendants, and for the intervenor, May Company.

Reversed and remanded with directions.

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*producer to operate upon the same basis as the large fruit and vegetable producer.*" (Emphasis supplied). 81 Cong. Rec. 7876.

"In other words, the small producer cannot afford to have the capital investment in the warehouse, the washing machinery, all of the necessary incidentals to this operation, while the larger producer can afford them, and he is exempt from the provisions of the bill." 81 Cong. Rec. 7877.

*"The purpose of the amendment is not for the protection of the packing plant or for the protection of the owners of the packing plant. The cost is paid by the producer. These packing plants just pass the cost back to the man who produces the apples. The farmer pays the bill. The purpose of the amendment is to permit the small farmer, who cannot afford to have his own warehouse and cannot afford to have his own washing machine, to be placed upon a parity with the larger producers, who can afford to maintain their own warehouses and their own washing machines, and their own equipment."* (Emphasis supplied). 81 Cong. Rec. 7877.

See also, the dissenting opinion in *Addison v. Holly Hill Co.*, 322 U.S. 607, at p. 633.

<sup>2</sup> See *Fleming v. Farmers Peanut Co.*, 5th Cir., 128 F. 2d 404; cf. *Puerto Rico Tobacco Marketing Coop. Ass'n v. McComb*, 1st Cir., 181 F. 2d 697.

<sup>19</sup> See *Messenger v. Traders Compress Co.*, D.C. E. Dist. Okla., 107 F. Supp. 354, 360; *Walling v. McCracken County Peach Growers Ass'n*, D.C. W. Dist. Ky., 50 F. Supp. 900, 905, 906.

96 JAS. P. MITCHELL VS. KING EDWARD TOBACCO CO., ET AL.

175 In United States Court of Appeals

No. 15071

KING EDWARD TOBACCO COMPANY OF FLORIDA AND MAY TOBACCO  
COMPANY, INTERVENOR.

*versus*

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPART-  
MENT OF LABOR

JUDGMENT—April 15, 1955

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to enter judgment for the defendant, and for the intervenor, May Company.

176 Clerk's Certificate to foregoing transcript omitted in printing.

177-178 Supreme Court of the United States

No. ———, October Term, 1955

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 1, 1955.

(S.) HUGO L. BLACK,

Associate Justice of the Supreme  
Court of the United States.

Dated this 8th day of July, 1955.

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Supreme Court of the United States

No. 278, October Term, 1955

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 17, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.